Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ALAMO TITLE INSURANCE, a member of the Fidelity National Group of Companies, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Petitioners,

v.

NICHOLAS LISANTI and GERALDINE LISANTI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners demanded that disputes arising from a title insurance policy issued through interstate commerce to the Respondents be arbitrated as provided in the arbitration clause of such policy.

The arbitration clause, contained in a uniform form of title insurance approved by the New Mexico State Superintendent of Insurance under his general legislative authority to completely regulate the business of title insurance, has been invalidated by the New Mexico Supreme Court on the grounds that the disputes between Petitioners and Respondents are common law and statutory claims which the Respondents have a state constitutional right to be tried to a jury.

The questions presented are:

1. Whether the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, considered in the context of an arbitration provision in an insurance policy pre-empts the rights of the Respondents under State law to have their claims against their insurer heard by a jury.

2. Whether an arbitration clause in a state mandated form of insurance policy constitutes a "non-consensual submission" to arbitration which falls within the exceptions clause for enforcement of an agreement to arbitrate under the Federal Arbitration Act, 9 U.S.C. § 2, for "such grounds as exist at law or equity for the revocation of any contract."

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29(4)(c), because the constitutionality of a New Mexico constitutional provision is drawn into question, and the State of New Mexico and no agency, officer or employee thereof is a party, 28 U.S.C. § 2403(b) may apply and therefore this document is served upon the Attorney General of the State of New Mexico. Pursuant to this rule, no state court has certified any issue to the Attorney General of the State of New Mexico.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Alamo Title Insurance (Alamo), formerly known as Alamo Title Insurance of Texas, is a Texas corporation authorized to do business in New Mexico. Alamo is a wholly owned subsidiary of Alamo Title Holding Company, a Texas corporation (ATHC). Petitioner, Fidelity National Title Company (Fidelity), is a California corporation authorized to do business in New Mexico. ATHC and Fidelity are wholly owned subsidiaries of Fidelity National Financial, Inc., a publicly traded California corporation.

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Petitioners Alamo and Fidelity respectfully pray that a writ of certiorari be issued to review the judgment of the New Mexico Supreme Court in this case.

OPINIONS BELOW

The opinion of the New Mexico Supreme Court is reported at 41 N.M. St. B. Bull. 44 (October 31, 2002) and is reproduced as Appendix A in the appendix to this Petition (Pet. App.) at 1a. The decision without published opinion of the New Mexico Supreme Court granting a writ of certiorari to said Court is reported at 131 N.M. 363, 36 P.3d 953 (2001). The decision of the New Mexico Court of Appeals is reported at 131 N.M. 334, 35 P.3d 989 (Ct. App. 2001). (Pet. App. 17a) The decision of the Seventh Judicial District Court, Torrance County, New Mexico is not reported. (Pet. App. 26a)

STATEMENT OF JURISDICTION

The New Mexico Supreme Court entered its judgment on September 19, 2002.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, art. VI, provides: "[T]he laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Federal Arbitration Act (FAA), 9 U.S.C. § 1, provides: " '[C]ommerce,' as herein defined, means commerce among the several States . . . ,"

The FAA, 9 U.S.C. § 2, provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in

> writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a)

The Constitution of the State of New Mexico, N.M. Const. art. II, § 12, provides: "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate."

The New Mexico Title Insurance Law, N.M. Stat. Ann., § 59A-30-2A (1978), provides: "The purpose of the New Mexico Title Insurance Law . . . is to provide a comprehensive body of law for the effective regulation and active supervision of the business of title insurance transacted within this state in response to the McCarran-Ferguson Act. (P.L. 79-15, 15 U.S.C. §§ 1011-1015)."

The New Mexico Title Insurance Law, N.M. Stat. Ann., § 59A-30-2B (1978), provides: "The legislature intends that the business of title insurance be totally regulated by the state to provide for the protection of consumers and purchasers of title insurance policies and the financial stability of the title insurance industry."

The New Mexico Administrative Code, 13 NMAC 14.18.14, 2002, NM Form 1 Owner's Policy, provides:

* * *

> 14. Arbitration.
>
> Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the

> insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. . . . Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties.
>
> * * *

The New Mexico Rules of Appellate Procedure, Rule 12-216(B) NMRA 2002, provides: "This rule [that to preserve a question for review it must appear that a ruling or decision of the district court was fairly invoked] shall not preclude the appellate court from considering jurisdictional questions. . . ."

STATEMENT OF THE CASE

This case involves the issues of whether the FAA, which provides that an arbitration clause in a contract properly within its scope "shall be valid, irrevocable and enforceable", preempts a state constitutional provision requiring certain matters to be tried to a jury; and whether the fact that such contract is mandated by the state's regulatory authority triggers the exceptions clause of the FAA, 9 U.S.C. § 2, when a state court has held the arbitration clause to be "nonconsensual." The contract at issue is a written policy of title insurance pursuant to which Petitioners undertook to defend Respondents, as contract purchasers, against certain claims raised by third parties adverse to Respondents' title or interest in the insured property and to indemnify Respondents for any covered losses. The contract contained an express arbitration provision which could be invoked by either Petitioners or Respondents, and which, when invoked, required the parties to arbitrate their dispute under the Title Insurance Arbitration Rules of the American Arbitration Association.

Respondents seek to avoid the requirements of the FAA by asserting that state law based claims and a state constitutional right to a trial by jury render the arbitration clause invalid.

A. The Policy and the Third Party Claim.

Petitioner Alamo, a Texas corporation authorized to do business in New Mexico as a foreign insurance corporation, issued a written, contract purchaser policy of title insurance (No. 1-001 006537) (the Policy) to the Respondents, effective November 16, 1995 (the Policy Date), insuring their interest in title as real estate contract purchasers of certain real property located in Torrance County, New Mexico. Petitioners' Lodging (Pet. Lodg.) at L-5. Approximately three years after the Policy Date, Respondents made a claim under the Policy, demanding that Alamo provide a defense to a claim purportedly made by an adjacent landowner. The adjacent landowner had a survey performed approximately three years after the Policy Date which purportedly showed a conflict between the adjacent landowner's boundary and Respondents' boundary. The adjacent landowner had filed no suit or other action to obtain an adjudication of her title or boundaries, although she had written to Respondents asserting the existence of a conflict, encroachment and overlap.

Petitioner Alamo investigated the matter and then denied Respondents' claim for coverage in January 1999, because the Policy in Schedule B, Exceptions from Coverage, provided, in pertinent part:

> This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of: . . . (3) Encroachments, overlaps, conflicts in boundary lines, shortages in area, or other matters which would be disclosed by an accurate survey and inspection of the premises.

Pet. Lodg. L-10. The insuring clauses of the Policy also excluded coverage for adverse claims and other matters created after the Policy Date. *Id.* Respondents asserted that the denial of coverage was made in bad faith.

Paragraph 14 of the Policy Conditions and Stipulations contained an arbitration clause, among the other clauses required by 13 NMAC 14.18.14, 2002, as promulgated by the State of New Mexico Superintendent of the Department of Insurance (Superintendent of Insurance).

B. Petitioners Filed a Proper Demand for Arbitration.

On September 3, 1999, Petitioners Fidelity and Alamo (though not separately named in the demand) filed a Demand for Arbitration with the American Arbitration Association (AAA) as permitted by the Policy, demanding arbitration of Petitioner Alamo's obligations in Schedule B, paragraph 3 of the Exceptions from Coverage, paragraph 3 of the Exclusions from Coverage, and paragraph 4 of the Conditions and Stipulations. The Demand further referenced the Respondents' claim that Petitioner Alamo had acted in bad faith and sought arbitration of those claims under paragraph 14 of the Policy Conditions and Stipulations. Petitioners specifically sought that the following matter be arbitrated:

> The Company seeks a determination and award through arbitration that it has complied with its obligations under the terms of the Contract Purchasers Policy, and has provided the services it is obligated to provide under the policy provisions. The Company further seeks a determination that the insureds have not sustained any monetary loss for matters covered by the policy.

Pet. Lodg. L-1, L-4.

C. Proceedings Before the Courts of New Mexico.

1. The District Court Stayed Litigation in Favor of Arbitration.

In response to the Petitioners' Demand for Arbitration, Respondents filed a Complaint against Petitioners in New Mexico state district court on October 26, 1999, for Declaratory and Injunctive Relief for Stay of Arbitration Proceedings and

for Declaratory Relief and Damages for Breach of the New Mexico Insurance Unfair Practices Act, Breach of Fiduciary Duty, Breach of the Covenant of Good Faith and Fair Dealing and Breach of the New Mexico Unfair Trade Practices Act. On November 8, 1999, Petitioners filed a Response in Opposition to Plaintiff's Motion for Preliminary Injunction and Cross Motion to Compel Arbitration. On December 9, 1999, the State district court, after hearing, denied Respondents' Motion and stayed the district court litigation pending conclusion of the arbitration proceedings or further order of the court. Respondents appealed the district court's order to the Court of Appeals of the State of New Mexico (Court of Appeals).

2. The Court of Appeals Reversed the District Court's Order and Denied the Referral to Arbitration.

The Court of Appeals filed its Opinion on September 11, 2001, *Lisanti v. Alamo Title Ins. of Texas*, 35 P.3d 989, which reversed the district court's order directing the parties to arbitrate the matter. The Court of Appeals ruled that the Respondents' claims were contractual claims arising out of common law and that "N.M. Const. art. II, § 12 therefore guarantees the Respondents a jury trial on those claims." The Court of Appeals further ruled that "the Lisantis cannot be said to have voluntarily consented to arbitration by entering into a contract containing an arbitration clause imposed on them by the State: their 'putative agreement' was a 'nonconsensual submission' to state-compelled arbitration." Pet. App. 21a. The Court of Appeals further ruled that neither the Respondents' common law claims nor their statutory claims, i.e., breach of the New Mexico Insurance Unfair Practices Act, N.M. Stat. Ann. §§ 59A-16-1, *et seq.* (1984) and breach of the New Mexico Unfair Trade Practices Act, N.M. Stat. Ann. §§ 57-12-1, *et seq.* (1967), were subject to arbitration. Pet. App. 23a.

3. The State Supreme Court Granted a Writ of Certiorari to Hear the Matter.

On October 1, 2001, Petitioners filed their Petition for Writ of Certiorari (Petition for Writ) seeking review of the Court of Appeals' Opinion before the Supreme Court of the State of New Mexico (State Supreme Court). Petitioners asserted that a number of recently decided cases raised issues of federal preemption pursuant to the provisions of the FAA and required review of the Court of Appeals Opinion by the State Supreme Court. Petitioners noted that on September 4, 2001, the South Carolina Court of Appeals in *Cox v. Woodmen of the World Insurance Company*, 556 S.E.2d 397, 399 (S.C. App. 2001), held that the FAA preempted a state law provision, S.C. Code Ann. § 15-48-10, which exempted "'any insured or any beneficiary under any insurance policy or annuity contract' from the South Carolina Arbitration Act" and ordered claims by class action plaintiffs who sued the fraternal benefits association to be arbitrated under the FAA. Petitioners pointed also to the case of *Fidelity National Title Ins. Co. of Tennessee v. Jericho Management, Inc.*, 722 So. 2d 740 (Ala. 1998) (Jericho I) in which the Alabama Supreme Court held that an Alabama statute prohibiting the resolution of disputes by arbitration was preempted by the FAA despite the language in the arbitration clause that states, "[u]nless prohibited by applicable law." Petitioners also advised the State Supreme Court that on appeal after remand in the case of *Jericho Management, Inc. v. Fidelity Nat. Title Ins. Co. of Tennessee*, 811 So. 2d 514 (Ala. 2001) (Jericho II) the Alabama Supreme Court again affirmed the broad reach of the FAA and rejected the appellant's claim that Fidelity had waived its right to compel arbitration under the FAA by waiting for nineteen months after litigation had commenced before seeking to enforce the policy provision governing arbitration.

Petitioners had not raised their preemption claims prior to petitioning to the State Supreme Court because it was not until

the Court of Appeals rejected the terms of the contract, as well as the New Mexico legislative scheme for requiring uniform policy provisions with arbitration clauses for all title policies issued in New Mexico, that state law, as applied, and the provisions of the FAA were brought into conflict.

In their Petition for Writ, Petitioners referenced the Supremacy Clause of the U.S. Constitution and relevant federal court decisions holding that federal law, whether constitutional, statutory or regulatory, preempts any contrary state law, including state constitutional provisions, citing *United States v. Baer*, 235 F.3d 561 (10th Cir. 2000) (holding that federal criminal statute was supreme over conflicting state constitutional provision), and *Alabama-Coushatta Indian Tribe v. Mattox*, 650 F. Supp. 282 (W.D. Tex. 1986) ("Even assuming that the [federal statute] is truly in conflict with the Texas Constitution, the Supremacy Clause of the United States Constitution requires that the provisions of the federal statute prevail."). Petitioners also specifically cited the State Supreme Court to *Allied-Bruce Terminix Cos. Inc. v. Dobson*, 513 U.S. 265, 281 (1995) for the proposition that a state may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."

The State Supreme Court granted the Petition for Writ "only on issue numbered two as stated in the Petition." Petitioners' counsel and counsel for Respondents were advised by the State Supreme Court Clerk prior to briefing that the Court's order referencing "issue numbered two" was intended to refer to Question B in the Petition for Writ, and the issues in Question B were briefed by both parties.

On February 1, 2002, Petitioners filed their Brief-in-Chief before the State Supreme Court. Petitioners noted in their brief that "[t]he opinion of the Court of Appeals in this case raises the issue of whether the state constitutional right to a jury trial is preempted by the Federal Arbitration Act. . . ." Petitioners

stated, "the effect of [the Court of Appeals'] decision is to create exactly the conflict triggering the FAA's pre-emptive clause in 9 U.S.C. §2." Petitioners' Brief-in-Chief again referenced the federal cases cited in its Petition for Writ.

The federal preemption issue was further extensively addressed in the Brief of Amicus Curiae New Mexico Land Title Association, filed on or about February 20, 2002. Amicus Curiae briefs were also filed by the New Mexico Defense Lawyers Association, supporting the position of Petitioners, and the New Mexico Trial Lawyers Association, supporting Respondents.

4. The Opinion of the State Supreme Court Affirmed the Court of Appeals' Rejection of the Arbitration Provision and Refused to Consider the Federal Preemption Argument.

On September 19, 2002 the State Supreme Court entered its opinion affirming the opinion of the Court of Appeals. In addressing the federal preemption argument raised by Petitioners and other parties before it, the State Supreme Court stated, "Alamo has argued that the opinion of the Court of Appeals is preempted by 9 U.S.C. §§ 1-16 (2000). We did not grant certiorari on that question, and it was not raised to the trial court or to the Court of Appeals. We therefore do not address it." Pet. App. 14a.

5. Preemption is a Jurisdictional Issue Which Can Be Raised for the First Time on Appeal.

The Petition for Writ to the State Supreme Court identified as issue II(B)(2): "The Court of Appeals' Opinion conflicts with or misconstrues an opinion of this Court and of the United States Supreme Court." The conflict between the Court of Appeals' opinion and the opinions of the United States Supreme Court clearly raises issues of federal preemption. Further, issue II(C) raised the federal preemption issue stating, "Because of new case law, the Court of Appeals Opinion may raise serious federal

preemption issues." Petitioners noted in their brief that "[p]reemption is a jurisdictional issue that is not subject to the rule of preservation and may be raised for the first time on appeal."

REASONS FOR GRANTING THE PETITION

The Opinion of the State Supreme Court failed to address the federal preemption issue properly before it, thereby circumventing an important federal statute, the FAA. The result of the State Supreme Court's Opinion is that federal supremacy law is turned on its head and that the New Mexico constitution and statutes, (New Mexico Insurance Unfair Practices Act and New Mexico Unfair Trade Practices Act), trump federal law. The law of the State of New Mexico now conflicts with cases from other states which have affirmed federal preemption of the FAA over state based law in circumstances substantially similar if not identical to the factual background of this matter. In addition, the New Mexico appellate courts erroneously relied on cases from Oregon and Oklahoma which have not excised arbitration clauses from state regulated forms of contract on the grounds of non-consent but only found such arbitration to be non-binding.[1] The result not only runs contrary to Congress' purpose in adopting the FAA pursuant to the Commerce Clause, but impairs the valid expectations of the title insurance industry

1. The Court of Appeals relied on *Molodyh v. Truck Ins. Exch.*, 744 P.2d 992 (Or. 1987) and *Massey v. Farmers Ins. Group*, 837 P.2d 880 (Okla. 1992) for the proposition that binding state-compelled arbitration abridged the Respondents' right to a jury trial on their common law counts. Pet. App. B. The State Supreme Court similarly relied on *Molodyh* for its jury trial analysis. Pet. App. A. *Molodyh*, however, held only that the state-compelled appraisal process could not be binding on the party who did not demand arbitration. *Molodyh*, 744 P.2d at 998. *Massey* similarly held that a statutorily mandated fire policy provision requiring an appraisal procedure had no preclusive effect upon the party who did not demand the appraisal process. *Massey*, 837 P.2d at 885. Neither *Massey* nor *Molodyh* reached the extreme conclusion of the State Supreme Court, and neither the Oregon nor the Oklahoma courts were asked to consider the preemptive application of the FAA.

and other interstate insurance companies who are subject to state regulation and, most significantly, opens the door to further state-based incursions upon the sweep of the FAA. The effect on commerce and the title insurance industry among the states will likely be very damaging, and the door is opened to the rejection of the FAA as controlling over other state based claims in other contractual relationships.

I. The Federal Arbitration Act Preempts the New Mexico Constitution and Requires Arbitration of Respondents' Claims.

The FAA preempts the rights of Respondents to a jury trial, including state constitutional or statutory rights, and to judicial determinations as the jurisdictional forum for resolution of disputes between the insured and insurer. The Supremacy Clause of the United States provides, in pertinent part, that "the laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI.

The FAA was enacted in the exercise of Congress' plenary power over interstate commerce. As noted by this Court in *Perry v. Thomas*, 482 U.S. 483, 489-490 (1987) (additional citations omitted):

> "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Enacted pursuant to the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, this body of substantive law is enforceable in both state and federal courts. *Southland Corp. v. Keating*,

> 465 U.S. 1, 11-12 (1984) (§ 2 held to pre-empt a provision of the California Franchise Investment Law that California courts had interpreted to require judicial consideration of claims arising under that law). As we stated in *Keating*, "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10. "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16 (footnote omitted). Section 2, therefore, embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law. *Keating*, *supra*, 465 U.S. at 11.

Perry makes clear that the FAA preempts contradictory state constitutional and statutory provisions.

A. Federal Law Determines Whether State Law Conflicts With And Is Preempted by the FAA.

Section 2 of the FAA, as qualified by Section 1[2], determines the particular controversies within the scope of the FAA, and which are enforceable under Sections 3 and 4. *American Airlines, Inc. v. Louisville & Jefferson County Air Bd.*, 269 F.2d 811, 816 (6th Cir. 1959). The three elements required to invoke

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2. 9 U.S.C. § 1 defines "commerce" as "commerce among the several States . . . , but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

preemption by the FAA are: (1) there is a written contract containing an arbitration clause; (2) the contract evidences a transaction involving commerce; and (3) the contract was not the result of mutual mistake, or a condition which obviates agreement *ab initio*, such as fraud, mistake or duress. 9 U.S.C. § 2[3]. The FAA establishes that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983).

B. The FAA Preempts State Constitutional and Statutory Rights Including the Judicial Determination of Common Law and Statutory Claims Relating to Title Insurance.

FAA preemption applies to conflicting state constitutional rights including the right to trial by jury. *See, e.g., Jericho I*, 722 So. 2d at 743 (Alabama Supreme Court held that the Alabama Constitution Art. I § 11, providing "the right to a trial by jury shall remain inviolate" was preempted by the FAA.); *see, also, e.g., Arkoosh v. Dean Witter & Co.*, 415 F. Supp. 535, 537 at n.3 (D. Neb. 1976),

> [I]t would appear that under Nebraska law arbitration clauses, such as the one involved in this case, are unenforceable under . . . the Constitution of Nebraska. . . . However the contract involved in

3. A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

> the present case, is one 'evidencing a transaction involving commerce' and is, therefore, subject to the terms of 9 U.S.C. § 1 *et seq.* under the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, cl. 2.

Alabama-Coushatta, 650 F. Supp. at 289 (The Supremacy Clause of the United States Constitution requires that provisions of the federal statute prevail over conflicting provision in Texas Constitution.).

The FAA preempts state statutory claims as well. *See, e.g., Shearson/American Express v. McMahon*, 482 U.S. 220 (1987). Preemption by the provisions of the FAA have been applied within the insurance industry, *see, e.g., Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l. Life Ins. Co.*, 291 F. Supp. 225 (S.D.N.Y. 1968) (holding the FAA applied to insurance contracts), and specifically within the title insurance industry, *see, Jericho I*, 722 So. 2d 740 (Ala. 1998).

C. The Arbitration Provision in the Title Insurance Policy at Issue Meets all of the Requirements for Federal Preemption Under the FAA and Therefore, Preemption Should Apply.

The arbitration provision in the policy of title insurance at issue in this proceeding meets the FAA § 2 requirement of a "written agreement." The Policy provides specifically in paragraph 14 of the Conditions and Stipulations that:

> Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation.

Pet. Lodg. at L-8.

Second, the title insurance policy is a contract evidencing a transaction "involving commerce." 9 U.S.C. § 2. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), this Court reiterated the purpose, meaning and scope of Congress' requirement that the contract evidence a transaction "involving commerce":

> We had occasion in *Allied-Bruce*, [513 U.S.] at 273-277, to consider the significance of Congress' use of the words "involving commerce" in § 2. The analysis began with a reaffirmation of earlier decisions concluding that the FAA was enacted pursuant to Congress' substantive power to regulate interstate commerce and admiralty, *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967), and that the Act was applicable in state courts and pre-emptive of state laws hostile to arbitration, *see Southland Corp. v. Keating*, 465 U.S. 1 (1984). Relying upon these background principles and upon the evident reach of the words "involving commerce," the Court interpreted § 2 as implementing Congress' intent "to exercise [its] commerce power to the full." *Allied-Bruce*, *supra*, at 277.

Circuit City, 532 U.S. at 112 (additional citations omitted).

Thus, a transaction involves interstate commerce if it has virtually any tangible effect on the generation of goods and services for interstate markets and their distribution to the consumer. *See, e.g., id.*; *Southland Corp. v. Keating*, 465 U.S. 1, 14-16 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967), *Allied-Bruce*, 513 U.S. at 273-277. Title insurance policies have specifically been found to "involve commerce" so as to satisfy the requirements of the FAA. In *Jericho I*, 722 So. 2d at 744, the Alabama Supreme Court, relying upon *Southland*, and *Prima Paint*, held that, "the title insurance policy, which was issued by a Tennessee

corporation, and protects an Alabama corporation's mortgage in connection with a federally regulated loan transaction sufficiently affects interstate commerce to invoke the FAA." The facts surrounding the issuance of the title policy at issue in this case demonstrate the significant impact of title insurance on interstate commerce.[4]

The final question is whether grounds exist at law or in equity for the revocation of a contract. 9 U.S.C. § 2.

> [T]he only grounds for revocation which meet the requirement of 9 U.S.C. § 2 are mutual agreement or a condition which vitiates agreement *ab initio*, i.e., fraud, mistake, or duress. For it is only this kind of 'revocation' which can be harmonized with adjudication directed to 'the making of the agreement for arbitration.'

County of Middlesex v. Gevyn Constr. Corp., 450 F.2d 53, 56 (1st Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). Respondents' claims were for damages based on a breach of the title insurance policy provisions; there was no request for revocation or recision of the insurance policy.

The State Supreme Court and Court of Appeals focused on the mandatory nature of the insurance policy form and specifically the arbitration provision, 13 NMAC 14.18.14, to determine that the Respondents did not voluntarily consent to arbitration when the arbitration clause was imposed on them by the State. Pet. App. 15a, 21a. The State Supreme Court's conclusion that the arbitration clause was non-consensual because it was imposed by a state regulation, however, does not fall within the exceptions for non-enforceability of arbitration clauses under the FAA.

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4. Alamo is a Texas corporation and Fidelity is a California corporation. The initial premium payment was split between the title company located in New Mexico and Petitioner Alamo in Texas. Policy notices are sent to Petitioner Alamo in Texas. Correspondence was sent by the Respondents to Petitioner Alamo in Texas.

That the contract of insurance contained uniform terms approved by the State Superintendent of Insurance does not make the Policy void *ab initio*.[5] The State Supreme Court did not invalidate the terms of the entire Policy although its own analysis of state mandated regulation would result in a holding that none of the terms were consented to by either the insurer or the insured. Nor did the State Supreme Court find that the Policy was entered into under fraud or duress, reasons which might otherwise cause this Court to defer to a state court. Rather, the State Supreme Court invalidated only the arbitration clause, thereby squarely aligning itself with other state court actions that have been reversed by this Court. *See Southland*, 465 U.S. at 16 n.11,

> We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of *any* contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.

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5. Nor did Respondents assert any claim in the state court proceedings that the insurance contract should be rescinded because they had accepted it under fraud, mistake or duress. In fact, by bringing suit on the contract, and seeking remedies afforded only to holders of insurance policies, Respondents ratified it. *See, e.g., Wydel Associates v. Thermasol, Ltd.*, 452 F. Supp. 739, 742 (W.D. Tex. 1978) ("A contract cannot be adopted in part and rejected in part because the act of ratification extends to the entire contract." (Citations omitted.)); *see also State Farm Fire & Casualty Co. v. Price*, 684 P.2d 524, 533 (N.M. Ct. App. 1984), *cert. denied*, 683 P.2d 44 (insured is under a duty to read his policy and receipt and retention of a policy without objection by one who has had an opportunity to examine it for a reasonable time is regarded as an acceptance of its terms).

Similarly in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court reaffirmed that,

> *[S]tate law, whether of legislative or judicial origin, is applicable* if *that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2]*

517 U.S. at 685 (emphasis in original), *quoting Perry v. Thomas*, 482 U.S. 483, 492 n.9.

The purchase of title insurance was not compulsory. It was Respondents' voluntary decision to obtain insurance which binds them to the terms of the agreement. They cannot avoid their obligation by claiming lack of a meaningful option. *See, e.g., Herrington v. Union Planters Bank*, 113 F. Supp. 2d 1026, 1032 (S.D. Miss. 2000); *Green Tree Financial Corp. of Alabama v. Vintson*, 753 So. 2d 497 (Ala. 1999); *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 912 n.4 (S. Ct. Del. 1989) (The Supreme Court of Delaware decided that even where a contract of adhesion is present, a "voluntary agreement" to arbitrate is present when "no one had forced the insureds to enter a contract with any given insurance company.")

Even where a state court's decision appears to rest on state law grounds, a federal court in determining arbitrability does not stop with the application of state law rules for construing the parties' intentions. Rather, the court makes the determination of whether the parties agreed to arbitrate "by applying the 'federal substantive law of arbitrability.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), quoting *Moses H. Cone*, 460 U.S. at 24. The Court in *Mitsubishi* further determined, "[I]nsofar as the allegations underlying the [party's] statutory claims touch matters covered by the enumerated articles [of arbitration] the Court of Appeals

properly resolved any doubts in favor of arbitrability." *Mitsubishi*, 473 U.S. at 625 n.13 (citations omitted).

In their complaint, Respondents sought Declaratory and Injunctive Relief for Stay of Arbitration Proceedings and for Declaratory Relief and damages for Breach of the New Mexico Insurance Unfair Practices Act, Breach of Fiduciary Duty, Breach of the Covenant of Good Faith and Fair Dealing and Breach of the New Mexico Unfair Trade Practices Act. All of these causes of action arise from Petitioner's denial of coverage for a particular claim. All such claims are thus subsumed by paragraph 14 of the Policy providing for arbitration of "any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation." Pet. Lodg. at L-8.

In similar circumstances, where a party claimed a "forum selection" clause in a contract was not enforceable because it had not been bargained for, this Court has held that the lack of bargaining does not make an agreement unenforceable. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1992) ("[W]e do not adopt the Court of Appeals determination that a non-negotiated forum selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA"). In *Gilmer*, 500 U.S. at 23, this Court noted that the arbitration clause at issue was not in Gilmer's contract with his employer, Interstate, but rather in Gilmer's securities registration application as required by rules of the New York Stock Exchange. Nonetheless, the Court held the arbitration clause was enforceable. *Id.* at 26.

Respondents thus have no basis for avoiding arbitration and the preemptive impact of the FAA. The contrary decision of the State Supreme Court should accordingly be overruled

and Respondents' claims directed to arbitration in accord with the terms of the Policy. 9 U.S.C. § 3.[6]

D. The Decision of the State Supreme Court Runs Afoul of the FAA By Effectively Creating An Exception from the FAA For The State Mandated Arbitration Clause Though Such Clause Is Consistent With The FAA.

Even if the State Supreme Court's decision is analyzed under the reverse-preemptive provisions of the McCarren-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, (MFA), this Court should overrule the state court's decision under the Supremacy Clause.

In 1944, the United States Supreme Court determined that the business of insurance was "commerce" within the meaning of the commerce clause and thus subject to all federal laws, including those relating to antitrust. *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 553 (1944). In response to this decision, Congress enacted the MFA "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *Securities and Exchange Comm'n v. National Sec., Inc.*, 393 U.S. 453, 459 (1969). The mandate of the MFA is thus plain and clear – an act of Congress may not be construed to "invalidate, impair, or supersede" a state law enacted "for

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6. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

Pursuant to this authority, the New Mexico Legislature enacted the comprehensive New Mexico Title Insurance Law, N.M. Stat. Ann., § 59A-30-1, *et seq.* (1978), in 1985, and delegated its authority to regulate title insurance to the Superintendent of Insurance including the overall authority to implement and enforce the Insurance Code. N.M. Stat. Ann., § 59A-30-4 (1978); *see also* N.M, Stat. Ann., § 59A-2-8 (1984). The Superintendent was authorized to promulgate uniform forms of title insurance policy. N.M. Stat. Ann., § 59A-30-5 (1985) ("No title insurer or title insurance agent shall use any form of title insurance policy other than the uniform forms promulgated by the superintendent under the New Mexico Title Insurance Law.")

The State Legislature has also enacted the Uniform Arbitration Act, N.M. Stat. Ann., § 44-7-1, *et seq.* (2000), which, like Section 2 of the FAA, provides that "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" Section 44-7-1 (emphasis added). Insurance contracts are not exempted from the reach of the Uniform Arbitration Act, and the New Mexico Legislature therefore has not created a state law exemption from arbitration in the exercise of its power to regulate the business of insurance.

The State Supreme Court, in excising only the arbitration provision from these regulated contracts, has invalidated a key provision designed to allow for the speedy and economic determination of coverage and other disputed issues between an insured and the insurer. The effect of this selective surgery will be to delay determinations of coverage, make coverage issues much more expensive to resolve and open the insurance

industry to significant unknown financial impacts, i.e., significantly impacting interstate commerce. These results are the very results that the FAA was designed to avoid. The significance of these impacts, as well as the erroneous decision of the State Supreme Court, make clear the importance of the United States Supreme Court's consideration of this matter.

Additionally, by refusing to address the issue directly, the decision of the State Supreme Court effectively determined that the FAA does not apply to these arbitration provisions. New Mexico law is placed in direct conflict with the decisions of other states that have considered the applicability of the FAA and determined that the supremacy clause preempts contrary state law, whether constitutional or statutory. *Jericho I*, 722 So. 2d at 744 (title insurance policy held to sufficiently affect interstate commerce to invoke the FAA.). The United States Supreme Court should resolve this extant conflict between the States regarding the preemptive nature of the FAA in the context of insurance.

II. The State Supreme Court's Action Undermines Congress' Goals in Enacting the FAA.

The Opinion of the State Supreme Court expressly avoids the issue of federal preemption, notwithstanding that court's own analysis of the importance of forum preemption as distinguished from choice of law preemption. *See Gonzales, et al. v. Surgidev Corp., et al.*, 899 P.2d 576 (N.M. 1995); *Ashlock v. Sunwest Bank of Roswell, N.A.*, 753 P.2d 346 (N.M. 1988), *overruled on other grounds by Gonzales v. Surgidev Corp*, 899 P.2d 576 (N.M. 1995). Under the State Supreme Court's analysis in *Gonzales*, choice of law preemption does not necessarily divest the state court of its capacity to consider the particular matter. *Gonzales*, 899 P.2d at 582. However, where the federal preemption is in the nature of forum preemption, then the issue must be considered:

> In considering whether federal preemption affects subject matter jurisdiction, the issue is not whether

> Congress intended to replace state law with a federal regulatory scheme but "whether jurisdiction provided by state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body." *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387-88 (1986); . . . The *Davis* Court labelled (sic) this distinction choice-of-forum preemption, which deprives the state court of subject matter jurisdiction, as opposed to choice-of-law preemption, which limits the court's ability to grant relief on a state law claim. *Davis*, 476 U.S. at 391. Under choice-of-law preemption, a state court has jurisdiction to entertain the claim, but it must apply federal law in deciding the claim on the merits. In contrast, under choice-of-forum preemption, the state court lacks jurisdiction even to entertain the claim, which can then only be raised in federal court. . . . Thus we must look to the statute to determine whether it displaces state courts as forums for considering claims. . . . *See Davis*, 476 U.S. at 391, n.9 ("The nature of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-empting statute.").

Id. (citations omitted).

New Mexico provides that jurisdictional questions may be raised at any time, including for the first time on appeal. *See, e.g., Johnson v. C&H Constr. Co.*, 432 P.2d 267 (N.M. Ct. App. 1967), *overruled on other grounds, Kelly Inn No. 102, Inc. v. Kapnison*, 824 P.2d 1033 (N.M. 1992); *Chavez v. County of Valencia*, 521 P.2d 1154 (N.M. 1974). Indeed, the New Mexico courts have held that lack of jurisdiction at any stage in a proceeding is a controlling consideration which must be resolved before going further. *See In re Kinscherff*, 556 P.2d 355 (Ct. App.), *cert. denied*, 558 P.2d 620 (N.M. 1976). And, the New Mexico Rules of Appellate Procedure provide, in

pertinent part, that "[t]his rule [that to preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked] shall not preclude the appellate court from considering jurisdictional questions. . . ." Rule 12-216 NMRA (2002).

The FAA is clearly and unequivocally choice of forum preemption. 9 U.S.C. § 2. There is simply no reasonable basis for the view that this matter was subject to the continuing jurisdiction of the New Mexico state courts.

The State courts have expressed a clear intent to avoid the preemptive effect of the FAA in favor of judicial resolution of State-based constitutional and statutory claims by invoking trial by jury as the ground for refusing to entertain the issue. This preference for judicial resolution over alternative dispute resolution through arbitration is the state law hurdle that the FAA was enacted to avoid. *See Southland*, 465 U.S. at 14 ("The problems Congress faced were . . . twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements."). The decision below, if allowed to stand, would frustrate the Congressional purpose, and provide a basis for further "exceptions" to be carved out of the uniform policy the FAA was intended to establish.

III. Unless Reversed by this Court, the Decision of the State Supreme Court Will Have a Negative Effect on the Title Insurance Industry in New Mexico and on Interstate Commerce.

Title insurers across the United States offer the public the benefit of various types of title or rights protection for losses arising from defects in title to real property. The title policies issued in New Mexico are not unique to New Mexico, but are in basic use throughout the country. The owner's title policy issued to Respondents is a duplicate of American Land Title Association (ALTA) Form 10-17-92. The ALTA forms have been in widespread use around the United States since the mid-1900s.

Burke, *Law of Title Insurance* § 2.04 (3d Edition 2001 and Supp. 2002). The predictability and security created through uniform forms helped propel and secure mortgage lenders and in turn home ownership. *Id.* at 2-34 to -35.

The arbitration provision in the ALTA owners and loan policies were first adopted in 1986 and effective in 1987. *Id.* § 11.01, at 11-4. The use of arbitration clauses follows the trend in other high growth industries to use standardized forms to protect and benefit the public. *Id.* at 11-5. The New Mexico Legislature declared that it "intends that the business of title insurance be totally regulated by the state to provide for the protection of consumers and purchasers of title insurance policies and the financial stability of the insurance industry." N.M. Stat. Ann., § 59A-30-2 (1986). The insurance industry is generally recognized as an area of commerce "strongly affected with the public interest [and, thus,] subject to comprehensive regulation." *In re Producer Assignment Program*, 618 A.2d 894 (N.J. Super. Ct. App. Div. 1993); *see In re Aetna Casualty and Sur. Co.*, 591 A.2d 631 (N.J. Super. Ct. App. Div. 1991).

The premiums charged by title insurers in New Mexico are highly regulated and determined only after public hearing and evaluation of the underwriting risks based upon a regulated form of title policy which includes an arbitration clause. *See* N.M. Stat. Ann., § 59A-30-4(A) (1985) (the Superintendent of Insurance promulgates "rules and regulations requiring uniform forms of policies and uniform premiums") and 59A-30-6(C) (1985) ("Premium rates shall not be excessive, inadequate or unfairly discriminatory. . . ."). To eliminate from enforceability the arbitration clause and expose title insurers to a multitude of suits in the courts substantially affects the economic assumptions underlying title insurance premiums within the state of New Mexico and in other states. The impact on commerce is clear and the significance of the ruling of the State Supreme Court is far reaching given the hundreds of thousands of title insurance policies written not only within the state of New Mexico but nationwide.

CONCLUSION

The arbitrariness of the State Supreme Court in avoiding the preemption issue, ignoring decided New Mexico and federal law and ignoring the plain language of the FAA, emphasizes the need for this Court to consider this case and reverse the decision of the State Supreme court. The New Mexico state courts have expressed the clear intent to circumvent the FAA in favor of judicial control over matters which are arbitrable and are encompassed by agreements to arbitrate contrary to the federal substantive law which this Court has repeatedly affirmed. The actual effect of the State Supreme Court's ruling on the title insurance industry and the potential effect on other insurance industry segments offering policies in New Mexico which have, by regulation or statute, incorporated arbitration provisions in their policies is significant, direct and unwarranted given the express language of the FAA and the precedents of this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF NEW MEXICO DATED AND FILED SEPTEMBER 19, 2002

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 27,166

NICHOLAS LISANTI and GERALDINE LISANTI,

Plaintiffs-Respondents,

vs.

ALAMO TITLE INSURANCE OF TEXAS, a member of the Fidelity National Group of Companies, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
Thomas G. Fitch, District Judge

OPINION

MINZNER, Justice.

Alamo Title Insurance of Texas ("Alamo") appeals from an opinion of the Court of Appeals reversing an order of the district court staying proceedings on a complaint filed by Nicholas and Geraldine Lisanti ("the Lisantis") pending arbitration. *Lisanti v. Alamo Title Ins. of Tex.*, 2001-NMCA-

100, 131 N.M. 334, 35 P.3d 989. The Court of Appeals held that NMSA 1978, § 59A-30-4(A) (1985), which gives the superintendent of insurance the power to promulgate regulations, and a regulation which requires that all title insurance claims under $1,000,000 be resolved through arbitration, violate the Lisantis' right to a trial by jury guaranteed by Article II, § 12 of the New Mexico Constitution. *Lisanti,* 2001-NMCA-100, ¶ 10; *see also* NM Form 1: Owner's Policy, Public Regulation Commission, Insurance Division, Title Insurance Bureau, 13 NMAC § 14.18.14 (Apr. 3, 1995). The Court of Appeals also held that the trial court's decision regarding the Lisantis' statutory claims conflicted with NMSA 1978, § 59A-16-30 (1990) and NMSA 1978, § 57-12-10 (1987), which provide for claims brought under the Trade Practices and Frauds section of the Insurance Code and the Unfair Practices Act, respectively, to be judicially resolved. *Lisanti,* 2001-NMCA-100, ¶ 11. We affirm.

I.

Because of the procedural posture of this case, we know few facts concerning the dispute from which this appeal arose. The few facts we do know are undisputed. In November of 1995, the Lisantis purchased property in Torrance County. They also purchased title insurance for the transaction in the amount of $68,818 from Alamo, which has since merged with Defendant Fidelity National Title Insurance Company. *Id.* ¶ 3 n.1. A dispute arose between Alamo and the Lisantis regarding the coverage of the insurance policy, and Alamo filed a demand for arbitration, pursuant to a clause contained in the policy. The Lisantis filed a complaint in Torrance

County District Court, accompanied by a motion for preliminary injunction to prevent arbitration. The complaint alleged breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and statutory claims for unfair insurance practices and unfair trade practices. The trial court denied the motion for preliminary injunction and stayed the Lisantis' claims pending arbitration. On January 20, 2000, the trial court entered an order staying arbitration pending appeal.

On appeal the Court of Appeals concluded that the Lisantis had not consented to arbitration. Relying on *Board of Education v. Harrell,* 118 N.M. 470, 476, 882 P.2d 511, 517 (1994), the Court of Appeals noted that the arbitration clause contained in the insurance policy was required by law. *Lisanti,* 2001-NMCA-100, ¶ 7. In *Harrell,* a school superintendent argued that he never agreed at arm's length to mandatory arbitration of his claim that he was unfairly dismissed; that such mandatory arbitration violated his right to a jury trial, his right of access to the courts, and constituted an unconstitutional delegation of judicial authority; and that the manner in which the arbitration was handled violated due process. The Court concluded that, because the arbitration was required by statute, Harrell could not be said to have consented to it, but otherwise rejected his claims. The Court of Appeals analysis was based on both statutory and regulatory law.

Section 59A-30-4(A) provides that the superintendent of insurance "shall promulgate such rules and regulations as are necessary to carry out the provisions of the New Mexico Title Insurance Law, including rules and regulations requiring

uniform forms of policies. . . ." The Legislature has further provided that "[n]o title insurer or title insurance agent shall use any form of title insurance policy other than the uniform forms promulgated by the superintendent. . . ." NMSA 1978, § 59A-30-5 (1985).

The superintendent of insurance has promulgated a regulation regarding title insurance policies that requires arbitration for all claims under $1,000,000. That regulation reads:

> Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the

> insured, the Rules in effect at Date of Policy shall be binding upon the parties.

13 NMAC § 14.18.14.

In view of this regulation and the statutes under which it was promulgated, the Court of Appeals concluded that the Lisantis did not waive their right to a judicial forum. *Lisanti,* 2001-NMCA-100, ¶ 7. The Court of Appeals described the agreement represented by the title insurance policy as a " 'nonconsensual submission' to state-compelled arbitration." *Id.* (quoting *Harrell,* 118 N.M. at 476, 882 P.2d at 517).

The Court of Appeals also reasoned that the Lisantis' claims were claims for which jury trial is guaranteed by our state constitution, or statutory claims for which the Insurance Code and the Unfair Practices Act specifically provide a trial in district court. *Lisanti,* 2001-NMCA-100, ¶¶ 10-11. The Court of Appeals, after reviewing early New Mexico cases, concluded that "contract actions seeking money damages were routinely tried to juries during the territorial period." *Id.* ¶ 10. The Court of Appeals characterized the Lisantis' common law claims as contractual in nature and noted that they sought money damages. *Id.* The Court of Appeals also held that the regulation requiring mandatory arbitration in title insurance cases conflicts with Section 59A-16-30 and Section 57-12-10, the statutes that respectively form the basis of the Lisantis' unfair insurance and unfair trade practices claims. Section 59A-16-30 specifically grants to plaintiffs injured by an unfair insurance practice "a right to bring an action in district court to recover actual damages." Section 57-12-10(B) allows any person injured by prohibited

trade practices to "bring an action to recover actual damages." The Court of Appeals quoted an earlier case noting that "'[a]n agency by regulation cannot overrule a specific statute'" and that the rights created by these statutes prevailed over the regulation on which Alamo relied. *Lisanti,* 2001-NMCA-100, ¶ 11 (quoting *Jones v. Employment Serv. Div. of the Human Servs. Dep't.*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980)).

For these reasons, the Court of Appeals reversed the trial court's order staying further proceedings in district court pending arbitration pursuant to the title insurance policy terms. We agree with the Court of Appeals that the Lisantis cannot be said to have consented to the arbitration clause under which Alamo has asserted a right to arbitration. We also agree with the Court of Appeals that the statutory claims the Lisantis raise are claims for which the Legislature has provided a right to jury trial. Finally, we agree with the Court of Appeals that the regulation providing for mandatory arbitration violates the Lisanti's right to a trial by jury. Our reasons follow.

II.

The Court of Appeals concluded NMSA 1978, § 44-7-2(B) (repealed 2001) informs appellate review in this appeal and that the standard of review is de novo. *Lisanti,* 2001-NMCA-100, ¶ 6. No one disputes either conclusion, and we believe both are correct. Although the Lisantis requested a preliminary injunction, Section 44-7-2(B) provided for a summary trial on the issue of whether or not there is an agreement to arbitrate when the agreement is "in substantial

and bona fide dispute." It also authorized an order staying arbitration or an order to proceed to arbitration, depending on the resolution of the issue.

Article II, Section 12 of the New Mexico Constitution provides in pertinent part that "[t]he right to trial by jury as it as heretofore existed shall be secured to all and remain inviolate." New Mexico courts have consistently held that the phrase "as it heretofore existed" refers to the right to a jury trial as that right existed in the Territory of New Mexico immediately prior to the adoption of the state constitution. *See State ex rel. Bliss v. Greenwood,* 63 N.M. 156, 161, 315 P.2d 223, 226 (1957). The first question raised on appeal is whether the Court of Appeals erred in determining that the Lisantis' non-statutory claims under the policy were claims triable to a jury at common law.

A.

Alamo argues to this Court that although common law contractual claims were triable to a jury in the Territory of New Mexico before the state constitution was adopted, that fact is not dispositive. Alamo argues that the Court of Appeals erred in identifying the relevant question, and contends that because the specific right to sue under a title insurance policy did not exist in the territorial period, it is not a right for which a jury trial is guaranteed. In support of this argument, Alamo cites *Prudential Property & Casualty Insurance Co. v. Muir*, 513 A.2d 1129 (Pa. Commw. Ct. 1986).

In *Muir,* the petitioner insurance company claimed that a state-mandated arbitration clause in an uninsured motorist

insurance policy violated the right to trial by jury protected by Article I, Section 6 of the Pennsylvania Constitution. The right to a jury trial in Pennsylvania is guaranteed in all actions that were triable to a jury before the Pennsylvania Constitution was adopted in 1790. The court held that the mandatory arbitration clause was constitutional:

> It is obvious that the mandatory requirement of uninsured motorist coverage could not have been in existence at the time of the adoption of the Commonwealth's Constitution. Because the insurance industry in Pennsylvania is wholly governed by statute, and the right to a jury trial is not contained in the Act, there can be no violation of the constitutional right to a jury trial by requiring such binding arbitration.

513 A.2d at 1131.

The Lisantis dispute the claim that there was no right to a jury trial when suing on a title insurance policy in 1912. We decline to resolve this historical issue, because we think that the relevant question is whether the more generally described cause of action, such as breach of contract or breach of fiduciary duty, was triable to a jury in 1912. *See generally Molodyh v. Truck Ins. Exch.*, 744 P.2d 992, 996 (Or. 1987) (noting that "a jury trial on factual issues concerning an insurance policy long has been an established practice in this country.") The inquiry urged by Alamo is too narrow. It would allow the evisceration of the right to a jury trial on traditional common law claims when those claims are brought in a factual context that could not have existed in 1912. It is

unreasonable, for example, to say that no jury trial right attaches to a breach of contract claim concerning the purchase of a computer simply because computers did not exist when the New Mexico Constitution was adopted.

This result is supported by this Court's holding in *Harrell,* a holding we affirm. In *Harrell,* this Court held that an employee of the Carlsbad Municipal School District did not have an Article II, Section 12 right to a jury in his employment dispute with the district. Specifically, this Court noted that "[w]hen New Mexico adopted its constitution, there was no *civil action* under which public school employees aggrieved by their discharge from employment might seek relief from their employers." *Harrell,* 118 N.M. at 481, 882 P.2d at 522 (emphasis added). This Court went on to hold that "[b]ecause the *cause of action* prosecuted here did not exist at common law at the time our constitution was adopted, and because relief under the statute is essentially equitable, Harrell had no right to a jury trial." *Id.* at 482, 882 P.2d at 523 (emphasis added). It is therefore clear from *Harrell* that the cause of action, not its specific manifestation, is dispositive. The type of claim, not its subject matter, controls.

The language in Article II, Section 12 protects the right to a jury trial on any common law cause of action that predates our Constitution. This clearly includes breach of contract and breach of the covenant of good faith and fair dealing. We are less confident that breach of fiduciary duty was triable to a jury at common law, but no one has tried to distinguish among the nonstatutory claims made by the Lisantis and neither do we.

Appendix A

B.

The fact that some of the Lisantis' claims were triable to a jury is not dispositive of the issues raised by this case, however, because Alamo argues that the Lisantis voluntarily waived that right by choosing to insure their title, rather than to rely on a title opinion issued by counsel after a search of the relevant records. Alamo suggests that the Court of Appeals analysis regarding "nonconsentual submission" to the arbitration clause might be appropriate for insurance policies that provide mandatory coverage, such as motor vehicle insurance policies, but that the Lisantis' choice to purchase title insurance ought to be distinguished from the arbitration clause at issue in *Harrell.* We are not persuaded that the Court of Appeals erred in following *Harrell.* In both *Harrell* and this case, the party seeking to avoid mandatory arbitration voluntarily accepted the relationship with the other party. In both, however, the State had required that all disputes involving that relationship be sent to arbitration. Because the decision to arbitrate the disputes could not be voluntarily accepted or rejected, we think the Court of Appeals was correct to reject Alamo's argument that the Lisantis waived the right to trial by jury.

Alamo also argues that public policy in New Mexico favors the final resolution of disputes by arbitration and suggests that *Harrell* is inconsistent with that policy. In *Fernandez v. Farmers Insurance Co.,* 115 N.M. 622, 625, 857 P.2d 22, 25 (1993), we observed, "This Court has repeatedly reaffirmed the strong public policy in this state . . . in favor of resolution of disputes through arbitration." In *Dairyland Insurance Co. v. Rose,* 92 N.M. 527, 531, 591

P.2d 281, 285 (1979), we held that controversies should "be resolved by arbitration where contracts or other documents so provide." As these cases make clear, there is a strong public policy to enforce agreements to arbitrate. This is a sensible policy. We do not think, however, that the Court of Appeals disagrees, and we affirm that policy. When a party agrees to a non-judicial forum for dispute resolution, the party should be held to that agreement. *Id.* In this case, however, the Court of Appeals has reasoned, and we agree, that the parties to a dispute have not bargained for arbitration, because arbitration required by law cannot be described as a bargained-for result.

C.

Alamo primarily argues that the Court of Appeals erred in its application of the public rights doctrine as adopted and applied in *Harrell,* 118 N.M. at 482, 882 P.2d at 523. Properly applied, Alamo argues, that doctrine supports its position that the trial court properly ordered arbitration pursuant to the terms of the title insurance policy. Specifically, Alamo contends that when the Legislature "heavily regulates" an industry, the Legislature may assign the adjudication of disputes within that industry to a non-judicial forum such as arbitration.

The public rights doctrine is a creation of the United States Supreme Court. In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission,* 430 U.S. 442, 450 (1977), the Supreme Court held that

> At least in cases in which "public rights" are being litigated — *e.g.*, cases in which the Government

> sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact — the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

The doctrine was extended to private lawsuits seeking enforcement of public rights in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54-55 (1989), where the Supreme Court held

> The crucial question, in cases not involving the Federal Government, is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court. If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial.

(alteration in original) (citation and footnote omitted).

Appendix A

In *Harrell,* this Court relied on the public rights doctrine articulated in *Atlas Roofing* and *Granfinanciera* as support for the proposition that the Legislature in some circumstances can delegate resolution of a claim to a non-judicial body. *Harrell,* 118 N.M. at 482, 882 P.2d at 523. Relying on *Atlas Roofing,* this Court held that since Harrell sought a remedy against an agent of the state the public rights doctrine was applicable, "[e]ven if we interpreted Harrell's claim as stating a legal claim cognizable at common law at the time our constitution was adopted. . . ." *Harrell,* 118 N.M. at 482, 882 P.2d at 523. Without discussing the expansion of the doctrine in *Granfinanciera* to private causes of action, this Court cited to *Granfinanciera* to generally support its conclusion that there was "no constitutional infirmity in the lack of provision for a jury trial." *Harrell,* 118 N.M. at 482, 882 P.2d at 523.

The Supreme Court plainly stated in *Granfinanciera* that the class of "public rights" the adjudication of which may be assigned to administrative agencies or courts of equity sitting without juries is more expansive than suggested in *Atlas Roofing. Granfinanciera,* 492 U.S. at 53. Similarly, in *Harrell,* this court left open the possibility that "a legal claim cognizable at common law at the time our constitution was adopted," might be assigned for resolution "to an adjudicative body that does not use a jury as factfinder." *Harrell,* 118 N.M. at 482, 882 P.2d at 523. Consequently, the public rights doctrine under either the federal Constitution or the state constitution appears to be an evolving concept. *See generally* Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.8, at 99-101 (3d ed. 1994) (discussing the implications of the doctrine for administrative adjudication).

Nevertheless, we must reject Alamo's claim that the public rights doctrine applies to any heavily-regulated industry. We understand the doctrine to require a right of action that is "closely intertwined" with a regulatory program. *Granfinanciera,* 492 U.S. at 54. *See also Germain v. Conn. Nat'l Bank,* 988 F.2d 1323, 1331 (2d Cir. 1993) ("[I]f a party is going to be deprived of as fundamental a constitutional right as a jury trial, the controversy must be inextricably intertwined with a public right; the 'involvement' may not be casual or vague."). Further, the doctrine is "not at all implicated" in "wholly private tort, contract, and property cases." *Granfinanciera,* 492 U.S. at 51 (quoting *Atlas Roofing,* 430 U.S. at 458). The Lisantis assert rights that we believe must be characterized as casually or indirectly related to the regulatory scheme created by the legislature. The United States Supreme Court has said that "state-law causes of action for breach of contract or warranty are paradigmatic private rights." *Id.* at 56. We conclude that the rights the Lisantis assert on these facts are the equivalent of the "paradigmatic private rights" identified in *Granfinanciera. Id.* We therefore conclude that Alamo's reliance on the public rights doctrine is misplaced.

D.

Alamo has argued that the opinion of the Court of Appeals is preempted by 9 U.S.C. §§ 1-16 (2000). We did not grant certiorari on that question, and it was not raised to the trial court or to the Court of Appeals. We therefore do not address it.

Appendix A

III.

We affirm the Court of Appeals' determination that the Lisantis did not waive their right to have factual issues that were triable to a jury at common law at the time of statehood ultimately resolved by a jury in this case. Their purchase of a title insurance policy, the terms of which were mandated by statute and regulation, was not the equivalent of a voluntary contractual agreement to arbitration. We also affirm the Court of Appeals determination that the Lisantis' non-statutory claims were the type of claims that were triable to a jury at the time of statehood and that the public rights doctrine announced by the United States Supreme Court is not applicable on these facts. Because the regulation requiring mandatory arbitration violates the Lisanti's right to trial by jury, we hold that it is unenforceable, and we reverse the district court's order sending the matter to arbitration. We remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

s/ Pamela B. Minzner
PAMELA B. MINZNER, Justice

Appendix A

WE CONCUR:

s/ Patricio M. Serna
PATRICIO M. SERNA, Chief Justice

s/ Gene E. Franchini
GENE E. FRANCHINI, Justice

s/ Petra Jimenez Maes
PETRA JIMENEZ MAES, Justice

APPENDIX B — OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW MEXICO DATED AND FILED SEPTEMBER 11, 2001

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: _____

Docket No. 21,051

NICHOLAS LISANTI and GERALDINE LISANTI,

Plaintiffs-Appellants,

vs.

ALAMO TITLE INSURANCE OF TEXAS, a member of the Fidelity National Group of Companies, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Defendants-Appellees.

* * *

ALARID, Judge.

By regulation, every policy of title insurance issued in New Mexico must contain a provision providing for arbitration of disputes arising out of or relating to the policy. Where the amount of insurance is $1 million or less, either party may require the other to submit to arbitration. Appellee,

an insurer, invoked this provision to force Appellants, who are insured under a policy of title insurance issued by Appellee, to litigate their dispute before a panel of private arbitrators. Appellants argue that mandatory arbitration of their common-law claims pursuant to this provision violates their constitutional right to trial by jury. Appellants also argue that a regulation providing for mandatory arbitration of their statutory causes of action cannot override the Legislature's provision for judicial determination of these statutory claims. We agree with Appellants and reverse the trial court's order referring this dispute to arbitration.

BACKGROUND

Title insurance is subject to the New Mexico Title Insurance Law, NMSA 1978, §§ 59A-30-1 to -15 (1985, as amended through 1999). Subsection A of Section 59A-30-4 provides that "[t]he superintendent shall promulgate such rules and regulations as are necessary to carry out the provisions of the New Mexico Title Insurance Law, including rules and regulations requiring uniform forms of policies. . . ." (Citation omitted). Section 59A-30-5 provides that "[n]o title insurer or title insurance agent shall use any form of title insurance policy other than the uniform forms promulgated by the superintendent. . . ." In the exercise of this statutory authorization, the superintendent has promulgated a uniform title insurance policy containing the following provision relating to arbitration:

> Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules

> of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy. . . . All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. . . . Arbitration pursuant to this policy . . . shall be binding upon the parties.

13 NMAC § 13.18.14 (1986) renumbered as 13 NMAC § 14.6A.12 (2000).

In November 1995, Appellee, Alamo Title Insurance of Texas (Alamo)[1], issued a policy of title insurance insuring title to property located in Torrance County. Appellants, Nicholas and Geraldine G. Lisanti (the Lisantis), are the named insureds. The amount of insurance is $68,818. The policy contains the mandatory arbitration provision quoted above. When a dispute arose between Alamo and the Lisantis, Alamo filed a demand for arbitration, seeking a determination that "[Alamo] has complied with its obligations under the terms of the [policy], and has provided the services it is obligated to provide under the policy provisions . . . . [and] that the insureds have not sustained any monetary loss for matters covered by the policy."

In response to Alamo's demand for arbitration, the Lisantis filed a complaint in Torrance County District Court.

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1. According to the Complaint, Defendant Alamo has merged with Defendant Fidelity National Title Insurance Company.

Appendix B

The Lisantis asserted common-law claims against Alamo for breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty, and statutory claims for unfair insurance practices and unfair trade practices. The Lisantis sought declaratory relief and damages. The Lisantis asserted a claim directed to the arbitration clause in which they sought a declaration that the arbitration clause is unenforceable and an injunction precluding Alamo from proceeding with arbitration.

The Lisantis accompanied their complaint with a motion for preliminary injunction to prevent Alamo from pursuing arbitration. The Lisantis argued that "having to arbitrate the claims in this case would cause Plaintiffs irreparable harm by depriving Plaintiffs of access to the courts, due process, and their right to a jury trial." Citing *Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 118 N.M. 470, 476, 882 P.2d 511, 517 (1994), the Lisantis argued that an arbitration provision required by regulation was not an enforceable agreement to arbitrate. On December 9, 1999, the trial court denied the Lisantis' motion for preliminary injunction and ordered that the present action be stayed "until completion of arbitration." On January 20, 2000, the trial court entered an order staying arbitration pending appeal.

STANDARD OF REVIEW

Although this case comes before us from a denial of a preliminary injunction, we believe that the trial court's ruling is more properly viewed as the denial of a stay of arbitration, and therefore, the proper analytical framework is provided by NMSA 1978, § 44-7-2(B) (1971) rather than Rule 1-065

NMRA 2001. Unlike the grant of a preliminary injunction, the grant of a stay under Section 44-7-2(B) is not a matter of discretion: if there is no agreement to arbitrate, or if the purported agreement is unenforceable, arbitration must be stayed. Where, as here, the operative facts are not in dispute, denial of a stay of arbitration presents a pure question of law, subject to de novo review. *See DMS Properties-First, Inc. v. P.W. Scott Assoc., Inc.*, 748 A.2d 389, 391 (Del. 2000).

DISCUSSION

Alamo argues the Lisantis contractually waived the right to a judicial resolution of their dispute with Alamo by entering into a contract containing an arbitration clause. We disagree. Under *Harrell*, the Lisantis cannot be said to have voluntarily consented to arbitration by entering into a contract containing an arbitration clause imposed on them by the State: their "putative agreement" was a "nonconsensual submission" to state-compelled arbitration. 118 N.M. at 476, 882 P.2d at 517; *see also Massey v. Farmers Ins. Group*, 837 P.2d 880, 883 (Okla. 1992) (holding that legislature may not waive insured's right to jury trial by enacting statute that requires all fire insurance policies to include provision for binding appraisal); *Molodyh v. Truck Ins. Exch.*, 744 P.2d 992, 995 (Or. 1987) (rejecting argument that insured waived right to jury trial by entering into contract containing mandatory appraisal provision).

The Lisantis argue that binding state-compelled arbitration abridges their right to a jury trial of their common-law counts. We agree. Article II, Section 12 of the New Mexico Constitution provides that "[t]he right of trial by jury

as it has heretofore existed shall be secured to all and remain inviolate." "[T]he phrase 'as it has heretofore existed' refers to the right to jury trial as it existed in the Territory of New Mexico at the time immediately preceding the adoption of the Constitution." *State v. Greenwood*, 63 N.M. 156, 161, 315 P.2d 223, 226 (1957).

Alamo, citing *Harrell*, argues that the State, in the exercise of its police powers, may assign any claim, including legal claims traditionally triable to a jury, to a non-judicial forum in which there is no right to a jury. Alamo misreads *Harrell*. In *Harrell*, the Supreme Court relied upon the "public rights" exception to the right to jury trial in rejecting the argument that mandatory arbitration abridged the right to jury trial guaranteed by the New Mexico Constitution. The Supreme Court's statement in *Harrell* regarding the Legislature's authority to reassign legal claims cognizable at common law to administrative tribunals, *Harrell*, 118 N.M. at 482, 882 P.2d at 523 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n. 4 (1989)), must be read in the context of the Supreme Court's reliance on the public rights exception. *See Granfinanciera*, 492 U.S. at 51-52 ("Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment. . . . But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury."). The right to jury trial could scarcely be considered "inviolate" if, as Alamo argues, the State has complete freedom to reassign private claims traditionally triable to a jury to non-judicial tribunals in which a jury is unavailable. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 664 (1973) (noting

argument offered in support of Seventh Amendment that inclusion of constitutional guarantee of trial by jury would safeguard right from "misguided national legislature").

Our review of early New Mexico cases satisfies us that contract actions seeking money damages were routinely tried to juries during the territorial period. *E.g.*, *Lewis v. Baca*, 5 N.M. 289, 21 P. 343 (1889); *Smith v. Hicks*, 14 N.M. 560, 98 P. 138 (1908); *see also*, *Molodyh*, 744 P.2d at 996 (collecting cases; noting that "a jury trial on factual issues concerning an insurance policy long has been an established practice in this country."). All three of the Lisantis' common-law claims are contractual, UJI 13-1702 NMRA 2001, Committee comment; UJI 13-1708 NMRA 2001, Committee comment, and all three seek the legal relief of money damages. N.M. Const. art II, § 12 therefore guarantees the Lisantis a jury trial as to these claims. The Lisantis' may insist on having their common-law claims resolved in a court of law where trial by jury is available. *See Williams v. Williams*, 877 P.2d 1081 (Nev. 1994) (holding that statutorily-mandated arbitration of claims arising out of motor vehicle accident unconstitutionally interfered with right of jury trial).

With respect to their statutory claims, the Lisantis argue that the mandatory arbitration clause promulgated by the superintendent conflicts with NMSA 1978 § 59A-16-30 (1990), which provides that any person who has suffered damages as the result of a prohibited insurance practice "is granted a right to bring an action in district court to recover actual damages," and with NMSA 1978, § 57-12-10 (1967, as amended through 1987) which contemplates that any private action seeking redress for an unfair or deceptive trade

practice will be brought in a "court." We agree. The Legislature's specific designation of courts as the proper tribunal for resolution of these statutory claims controls over any inconsistent forum selection provision imposed by the superintendent of insurance. *See Jones v. Employment Serv. Div. of the Human Servs. Dep't*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980) ("If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute."). The Lisantis may insist on having their statutory claims heard in a court of law.

CONCLUSION

The trial court's order referring the Lisantis' claims to arbitration is reversed. On remand the trial court shall enter an order staying arbitration. The Lisantis' request for attorney's fees incurred in prosecuting this appeal is denied without prejudice. The Lisantis may apply to the trial court for an award of such fees should the Lisantis prevail on a cause of action as to which there is a right to attorney's fees. Costs incurred by the Lisantis in prosecuting this appeal shall be allowed as provided in Rule 12-403 NMRA 2001.

IT IS SO ORDERED.

s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

Appendix B

WE CONCUR:

s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

s/ Cynthia A. Fry
CYNTHIA A. FRY, Judge

APPENDIX C — ORDER DENYING PRELIMINARY INJUNCTION AND STAYING PROCEEDINGS OF THE STATE OF NEW MEXICO, COUNTY OF TORRANCE, IN THE SEVENTH JUDICIAL DISTRICT COURT DATED AND FILED DECEMBER 9, 1999

STATE OF NEW MEXICO
COUNTY OF TORRANCE
IN THE SEVENTH JUDICIAL DISTRICT COURT

No. D 00722 CV-00099-00189
Judge: Fitch

NICHOLAS LISANTI and GERALDINE LISANTI,

Plaintiffs,

vs.

ALAMO TITLE INSURANCE OF TEXAS and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Defendants.

ORDER DENYING PRELIMINARY INJUNCTION AND STAYING PROCEEDINGS

THIS MATTER came on to be heard on Plaintiffs' Motion for Preliminary Injunction prohibiting Defendants from proceeding to arbitration and the Court being advised in the premises finds that the same should be denied.

Appendix C

IT IS, THEREFORE ORDERED that Plaintiffs' Motion for Preliminary Injunction be, and hereby is, denied.

FURTHER ORDER that this cause shall be stayed until completion of arbitration or further order of this Court.

s/ Thomas G. Fitch
Thomas G. Fitch
District Judge, Division II

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

NM Const. Art. II, Sec. 12

Sec. 12. [Trial by jury; less than unanimous verdicts in civil cases.]

The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate. In all cases triable in courts inferior to the district court the jury may consist of six. The legislature may provide that verdicts in civil cases may be rendered by less than a unanimous vote of the jury.

* * * *

NEW MEXICO STATUTES 1978, ANNOTATED
CHAPTER 59A. Insurance Code
ARTICLE 30. Title Insurance

59A-30-2 Purpose and legislative intent of article.

A. The purpose of the New Mexico Title Insurance Law [Chapter 59A, Article 30 NMSA 1978] is to provide a comprehensive body of law for the effective regulation and active supervision of the business of title insurance transacted within this state in response to the McCarran-Ferguson Act (P.L. 79-15, 15 U.S.C. Sections 1011-1015).

B. The legislature intends that the business of title insurance be totally regulated by the state to provide for the protection of consumers and purchasers of title insurance policies and the financial stability of the title insurance industry.

* * * *

59A-30-3 Definitions.

As used in the New Mexico Title Insurance Law [Chapter 59A, Article 30 NMSA 1978]:

G. "title insurance policy" or "policy" means a contract indemnifying against loss or damage arising from any of the following which exist on or before the effective date of the policy:

(1) defects in the insured title;

(2) liens or encumbrances on the insured title;

(3) unmarketability of the insured title; or

(4) invalidity or unenforceability of liens or encumbrances on the property which is the subject of the policy. Title insurance policy or policy does not include an abstract;

. . .

* * * *

Appendix D

59A-30-4 Control and supervision by superintendent.

A. Title insurers and title insurance agents shall operate in New Mexico under the control and supervision of the superintendent. The superintendent shall promulgate such rules and regulations as are necessary to carry out the provisions of the New Mexico Title Insurance Law [Chapter 59A, Article 30 NMSA 1978], including rules and regulations requiring uniform forms of policies and uniform premiums. The superintendent may adopt uniform rules and regulations as to underwriting standards and practices, including but not limited to rules and regulations which prohibit title insurers from insuring specified risks which the superintendent determines may pose an unreasonable risk to the financial stability of title insurers.

* * * *

59A-30-5 Policy forms.

No title insurer or title insurance agent shall use any form of title insurance policy other than the uniform forms promulgated by the superintendent under the New Mexico Title Insurance Law [Chapter 59A, Article 30 NMSA 1978]. The superintendent shall not promulgate any uniform form under which the coverage offered is excessive or inadequate in relation to the premium charged for the coverage.

* * * *

Appendix D

59A-30-6 Premiums; agency agreements; duty to fix rates; exception.

* * *

C. Premium rates promulgated by the superintendent shall not be excessive, inadequate or unfairly discriminatory and shall contain an allowance permitting a profit that is not unreasonable in relation to the riskiness of the business of title insurance. Premium rates may include an allowance for recoupment of assessments made pursuant to the Title Insurance Guaranty Act.

* * * *

NEW MEXICO RULES OF COURT
RULES OF APPELLATE PROCEDURE
ARTICLE 2. APPEALS FROM DISTRICT COURT

RULE 12-216. SCOPE OF REVIEW

A. Preserving Questions for Review. To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review. Further, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

B. Exceptions. This rule shall not preclude the appellate court from considering jurisdictional questions or, in its discretion, questions involving:

(1) general public interest; or

(2) fundamental error or fundamental rights of a party.

* * * *

CODE OF NEW MEXICO RULES
TITLE 13. Insurance
CHAPTER 14. Title Insurance
PART 18. Forms

13.14.18.14 NMAC NM FORM 1 OWNER'S POLICY

Cover page.

Owner's Policy Of Title Insurance

Issued By

Blank Title Insurance Company

[NM Form 1; ALTA Form Rev. 10-17-92]

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS AND STIPULATIONS, BLANK TITLE INSURANCE

Appendix D

COMPANY, a Blank corporation, herein called the Company, insures, as of date of policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

4. Lack of a right of access to and from the land.

The Company will also pay the costs, attorney's fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

[Witness clause optional]

Dated _____

BLANK TITLE INSURANCE COMPANY

_____, President

_____, Secretary

Exclusions from coverage. The following matters are expressly excluded from the coverage of this policy and the

Appendix D

Company will not pay loss or damage, costs, attorneys' fees or expenses that arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

2. Right of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

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3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the insured claimant;

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

(c) resulting in no loss or damage to the insured claimant;

(d) attaching or created subsequent to Date of Policy; or

(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest by this policy.

4. Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:

(a) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or

(b) the transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure:

(i) to timely record the instrument of transfer; or

(ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

Schedule A.

[File No._____]

Policy No._____

Amount of Insurance $_____

[Premium $_____]

Date of Policy _____at [a.m.] [p.m.]

1. Name of Insured:

2. The estate or interest in the land which is covered by this policy is:

3. Title to the estate or interest in the land is vested in:

[4. The land referred to in this policy is described as follows:]

If Paragraph 4 is omitted, a Schedule C, captioned the same as Paragraph 4, must be used.

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Schedule B Exceptions from coverage.

[File No._____]

Policy No._____

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) that arise by reason of: [Policy may include regional exceptions if so desired by issuing company and variable exceptions such as taxes, easements, CC & Rs, etc.]

1.

2.

3.

4.

Conditions and stipulations.

1. Definition of Terms. The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

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(b) "insured claimant": an insured claiming loss or damage.

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule [A][C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A][C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or exempted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. Continuation of Insurance After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

3. Notice of Claim to be Given by Insured Claimant. The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided,

however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. Defense and Prosecution of Actions: Duty of Insured Claimant to Cooperate.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable

hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

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5. Proof of Loss or Damage.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy

all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph shall terminate any liability of the Company under this policy as to that claim.

6. Options to Pay or Otherwise Settle Claims: Termination of Liability. In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other than to make the payment required, shall terminate, including any liability or obligation to defend, prosecute, or

continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs (b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. Determination, Extent of Liability and Coinsurance. This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

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(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A; or,

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:

(i) where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy; or

(ii) where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.

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The provisions of this paragraph shall not apply to costs, attorneys' fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. Apportionment. If the land described in Schedule [A][C] consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement or by an endorsement attached to this policy.

9. Limitation of Liability.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully

performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

10. Reduction of Insurance — Reduction or Termination of Liability. All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto.

11. Liability Non-cumulative. It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

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12. Payment of Loss.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

13. Subrogation upon Payment or Settlement.

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) The Company's Rights Against Non-insured Obligors. The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

14. Arbitration.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation.

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All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. Liability Limited to This Policy: Policy Entire Contract.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title

to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

16. Severability. In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

17. Notices, Where Sent. All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at (fill in).

02-963

No. 02-

Supreme Court, U.S.
FILED
JAN 23 2003

IN THE

Supreme Court of the United States

ALAMO TITLE INSURANCE, a member of the Fidelity National Group of Companies, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Petitioners,

v.

NICHOLAS LISANTI and GERALDINE LISANTI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether any claim that Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, preempts the holding of the New Mexico Supreme Court in this case has been properly preserved for review by this Court?

2. Whether the holding of the New Mexico Supreme Court that, as a matter of state law, the state regulation that mandated arbitration in this case was void *ab initio* because the New Mexico Superintendent of Insurance had no authority to enact it, is an independent and adequate state ground for the court's decision?

3. Whether the Federal Arbitration Act, if it requires enforcement of state-mandated arbitration of disputes cognizable at common law, is consistent with the First, Seventh, Tenth and Fourteenth Amendments to the Constitution?

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IN THE

Supreme Court of the United States

ALAMO TITLE INSURANCE, a member of the Fidelity National Group of Companies, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Petitioners,

v.

NICHOLAS LISANTI and GERALDINE LISANTI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioners suggest that this Court has jurisdiction of their claim pursuant to 28 U.S.C. § 1257(a). While consideration of the Petition is appropriate under that statute, Respondents suggest an ultimate lack of jurisdiction, as the decision below rests on independent and adequate state grounds.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are statutory and constitutional provisions relevant to the issues before this Court which were not cited by the Petitioners:

The New Mexico Insurance Unfair Practices Act provides:

> Private right of action
>
> Any person covered by Chapter 59A, Article 16 NMSA 1978 who has suffered damages as a result of a violation of that article by an insurer or agent is granted a right to bring an action in district court to recover actual damages. Costs shall be allowed to the prevailing party unless the court otherwise directs. The court may award attorneys' fees to the prevailing party if:
>
> A. the party complaining of the violation of that article has brought an action that he knew to be groundless; or
>
> B. the party charged with the violation of that article has willfully engaged in the violation.
>
> The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state; provided, however, that the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] and the New Mexico Occupational Disease Disablement Law provide exclusive remedies.

N.M. STAT. ANN. 1978 § 59A-16-30 (1990).

The New Mexico Unfair Practices Act provides:

> Private remedies

A. A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required. Relief granted for the copying of an article shall be limited as to the prevention of confusion or misunderstanding as to source.

B. Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars ($ 100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars ($ 300), whichever is greater, to the party complaining of the practice.

C. The court shall award attorneys' fees and costs to the party complaining of an unfair or deceptive trade practice or unconscionable trade practice if he prevails. The court shall award attorneys' fees and costs to the party charged with an unfair or deceptive trade practice or an unconscionable trade practice if it finds that the party complaining of such trade practice brought an action which was groundless.

> D. The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.
>
> E. In any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class as a result of the unlawful method, act or practice.

N.M. STAT. ANN. 1978 § 57-12-10 (1987).

The McCarron-Ferguson Act provides:

> Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948
>
> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act,

> and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012.

The First Amendment to the United States Constitution provides:

> Religious and political freedom.
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Seventh Amendment to the United States Constitution provides:

> Trial by jury in civil cases.
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

The Tenth Amendment to the United States Constitution provides:

> Powers reserved to states or people.
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

The Fourteenth Amendment to the United States Constitution provides:

> Sec. 1: [Citizens of the United States.]
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

STATEMENT OF CASE

Respondents, Nicholas and Geraldine Lisanti, sued Petitioners, Alamo Title Insurance of Texas and its apparent successor, Fidelity National Title Insurance Company, in Torrance County, New Mexico District Court. They alleged violation of the New Mexico Insurance Unfair Practices Act, breach of fiduciary duty, breach of contract,

breach of good faith and fair dealing, and violation of the New Mexico Unfair Practices Act.

Respondents asked the trial court to stay arbitral proceedings which had been initiated by Petitioners. Those proceedings involved certain claims also the subject of litigation. Respondents asserted that the arbitration clause giving rise to the arbitral proceedings was a nullity.

The arbitration clause in question was mandated by the state.[1] Respondents asserted in their verified complaint

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[1] The title insurance regulations codified in the New Mexico Administrative Code preclude the sale or purchase of title insurance without the inclusion of the arbitration clause contained in N.M. ADMIN. CODE tit. 13, § 14.6A.12. *See* N.M. ADMIN. CODE tit. 13, §§14.2.11.4, 14.6A.8, 14.6A.12. The regulation requires the following language in agreements between sellers and purchaser:

> Unless prohibited by applicable law, either the Company or the Insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is $1,000,000 shall be arbitrated only when

that the arbitration clause was invalid for reasons Petitioners now aver are inconsistent with the FAA:

> 75. The Lisantis never agreed to the arbitration clause. Instead, the Title Company's claim for arbitration is based on an arbitration clause that, according to the Title Company, is required by the New Mexico Department of Insurance. Any administrative requirement that the Lisantis arbitrate fails to meet constitutional standards as set forth in Board of Educ. of Carlsbad Mun. Sch. v. Harrell, 118 N.M. 470, 476, 882 P.2d 511, 517 (1994), and is therefore unenforceable.
>
> 76. In any event, the claims set forth herein, including without limitation insurance coverage and duty to defend issues and the Lisantis' statutory and punitive damages

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> agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

It is undisputed that the claim between the parties here was for under one million dollars.

> claims, are not arbitrable as a matter of public policy.
>
> * * *
>
> 80. Wherefore, this Court should declare the arbitration clause unenforceable and enjoin the Title Company from proceeding with arbitration.

Respondents' motion in the trial court[2] also raised the issues Petitioners now aver give rise to FAA preemption. In the motion, Respondents raised the lack of authority of the Superintendent of Insurance to mandate arbitration by promulgating a regulation:

> [T]he Insurance Unfair Practices Act provides that a person who has suffered damages as a result of a violation of the Act is "granted a right to bring an action in district court to recover actual damages." NMSA 1978, § 59A-16-30 (1990) (emphasis added). The Department of Insurance cannot change statutory law. See Jones v. Employment Serv. Div., 95 N.M. 97, 99, 619 P.2d 542, 544 (1980); State ex rel. Helman v. Gallegos, 114 N.M. 414, 418, 839 P.2d 624, 628 (Ct. App. 1992).

Motion for Preliminary Injunction and Permanent Injunction Enjoining Defendants from Pursuing Arbitration and Memorandum in Support Thereof, at pp. 3-4.

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[2] Motion for Preliminary Injunction and Permanent Injunction Enjoining Defendants From Pursuing Arbitration and Memorandum in Support Thereof.

The Respondents further relied on the New Mexico Supreme Court case of *Board of Educ. of Carslbad Mun. Sch. v. Harrell*, 118 N.M. 470, 476, 882 P.2d 511, 517 (1994), in which the New Mexico Supreme Court had set criteria for determining whether a state mandated arbitration provision exceeded delegated authority. Motion for Preliminary Injunction and Permanent Injunction Enjoining Defendants from Pursuing Arbitration and Memorandum in Support Thereof, at pp. 3-4.

Petitioners joined these issues on state law grounds, claiming that the regulation mandating arbitration was within the powers of the Superintendent of Insurance and that it did not violate state statutes or the state constitution.

Petitioners concede that they never raised the issue of federal preemption at the trial court level. Petition, at p. 7. In fact, Petitioners made no mention of the FAA *at all* as having any bearing on the case. *See* Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross Motion to Compel Arbitration and Supporting Memorandum of Points and Authorities. Instead, the Petitioners stated at the trial court level that "[t]he law of the situs in this case includes the provisions of the New Mexico Uniform Arbitration Act, NMSA 1978 Sections 44-7-1 *et seq.* and specifically would include Section 44-7-12 Vacating an Award and Section 44-7-19 Appeals which provide for appellate [sic] of decisions of the District Court." Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross Motion to Compel Arbitration and Supporting Memorandum of Points and Authorities, at p. 6.

The Petitioners did not dispute the Lisantis' verified factual assertion that there was no "written agreement"[3] to arbitrate.

The trial court denied the injunctive relief Respondents requested. Interlocutory appeal was taken to the state intermediate appellate court, which reversed and remanded for trial.

In holding the arbitration clause invalid, the New Mexico Court of Appeals found that the clause violated a state statute regulating insurance practices:

> With respect to their statutory claims, the Lisantis argue that the mandatory arbitration clause promulgated by the superintendent conflicts with NMSA 1978 § 59A-16-30 (1990), which provides that any person who has suffered damages as the result of a prohibited insurance practice 'is granted a right to bring an action in district court to recover actual damages"

Pet. App. 23a; found that the clause inhibited enforcement of other statutory rights:

> and [the clause conflicts] with NMSA 1978, § 57-12-10 (1967, as amended through 1987) which contemplates that any private action seeking redress for an unfair or deceptive trade practice will be brought in a 'court'

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[3] A written agreement to arbitrate is a criterion for coverage by the FAA. 9 U.S.C § 2.

Pet. App. 23a; and found that state statutes[4] and the state constitution[5] denied the Superintendent of Insurance authority to enact a regulation compelling arbitration.

The Petitioners sought review in the New Mexico Supreme Court of the decision of the intermediate appellate court. For the first time, in their petition for certiorari, the Petitioners raised the preemption issue. The New Mexico Supreme Court refused to address the issue because "it was not raised to the trial court or to the Court of Appeals." Pet. App. 14a.

In affirming the New Mexico Court of Appeals, the New Mexico Supreme Court approved the rationale of the Court of Appeals that "an agency by regulation cannot overrule a specific statute." Pet. App. 6a. The New Mexico Supreme Court also found that the constitution of New Mexico precluded the Superintendent of Insurance from mandating arbitration of this dispute. Pet. App. 8a-9a, 15a.

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[4] "The Legislature's specific designation of courts as the proper tribunal for resolution of these statutory claims controls over any inconsistent forum selection provision imposed by the superintendent of insurance. *See Jones v. Employment Serv. Div. of the Human Servs. Dep't*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980) ("If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute.')." Pet. App. 24a.

[5] "The Lisantis argue that binding state-compelled arbitration abridges their right to a jury trial of their common-law counts. We agree." Pet. App. 21a-22a.

REASONS FOR DENYING THE PETITION

I. NO ISSUE OF FAA PREEMPTION WAS PROPERLY PRESERVED FOR REVIEW BY THIS COURT

As a general rule, of course, issues may not be raised for the first time on appeal.[6] A narrow exception exists for certain preemption claims.

A party can raise a preemption argument for the first time on appeal if a state court's jurisdiction is preempted by federal law vesting exclusive jurisdiction over the controversy in another body; this is known as choice of forum preemption. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387-88 (1986). As a matter of state practice, New Mexico employs the same standard. *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 899 P.2d 576 (1995) (a federal preemption argument cannot be raised for the first time on petition to the New Mexico Supreme Court unless the federal statute displaces state courts as forums).

Petitioners try to fall within the exception set forth in *Davis* and *Surgidev* by arguing, "[t]he FAA is clearly and unequivocally choice of forum preemption." Pet. at 24. Petitioners cite to no authority for this proposition, except to the arbitration act itself, 9 U.S.C. § 2, *supra*, which merely states that arbitration clauses in transactions involving interstate commerce are enforceable. It says nothing about preemption.

The argument is untenable. This Court cautioned in *Davis* that the exception it was creating was a narrow one:

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[6] *See State v. Sanchez*, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976). Hundreds of New Mexico cases have applied this general rule.

> [O]ur decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual regulatory or adjudicatory power *as opposed to a state's substantive laws.*

Davis, 476 U.S. at 391, n. 9 (emphasis supplied). Nothing in the FAA divests state courts of jurisdiction to hear matters regarding the enforceability of arbitration clauses. "It is . . . well-settled that state courts have jurisdiction to hear cases arising under the Federal Arbitration Act." *Harbuck v. Marsh Block & Co.*, 896 F.2d 1327 (11th Cir. 1990). *See also Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989)(The Federal Arbitration Act "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."). This Court has entertained numerous disputes regarding the enforceability of arbitration clauses that initially have been heard by state courts. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1 (1983); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

The narrow exception of *Davis* does not save Petitioners from their failure to timely raise the issue of preemption of "a state's substantive laws." *Davis*, 476 U.S. at 391, n. 9.

Even if the Petitioners could raise the issue for the first time on appeal, the Petitioners failed to present evidence or seek any findings on the issue of the nexus of this agreement with interstate commerce. This failure renders the Court without the ability to review the issue on appeal. *See Gavlik Constr. Co. v. H. F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975) (holding that the absence of findings precluded the Third Circuit's consideration of the applicability of the Federal Arbitration Act). *See also Davis*, 476 U.S. at 398-399 (in which the Court held that

the party asserting preemption must make an affirmative showing that the activity is subject to federal law).

II. THE NULLIFICATION OF A STATE REGULATION MANDATING ARBITRATION CLAUSES IN INSURANCE CONTRACTS IS OUTSIDE THE PURVIEW OF THE FAA AND CONSTITUTES ADEQUATE AND INDEPENDENT GROUNDS FOR THE DECISION OF THE NEW MEXICO SUPREME COURT

This Court will not review the decision of a state supreme court when the decision is supported by independent and adequate state law grounds. *Davis*, 476 U.S. at 387. The ruling of the New Mexico Supreme Court that the New Mexico Superintendent of Insurance was without authority, as a matter of state law, to compel these parties to arbitrate their claims is wholly outside the purview of the FAA and purely a matter of state law. It suffices to support the ruling of the court.

The arbitration clause at issue here exists solely because of state action. The relevant inquiry of the New Mexico Supreme Court was confined to whether the state action was valid, not whether the arbitration clause was valid:

> Because the *regulation requiring mandatory arbitration* violates the Lisanti's right to trial by jury, we hold that *it* is unenforceable.

Pet. App. 15a (emphases supplied). The Court merely invalidated a regulation. As a matter of state law, this rendered the regulation void *ab initio*. *See, e.g., White v. Board Education Silver City*, 42 N.M. 94, 75 P.2d 712 (1938) (holding that unconstitutional government conduct is void *ab initio*.) *See also Mechem v. City of Santa Fe*, 96 N.M. 668, 634 P.2d 690 (1981) (striking from a government

contract and permit an unconstitutional regulatory and contractual provision restraining alienation of property).

No other rationale of the New Mexico Supreme Court is necessary to support its holding. This rationale constitutes independent and adequate state grounds for the holding and requires that no review take place in this court. *Davis*, 476 U.S. 387-88.

III. INVALIDATION OF THIS ARBITRATION CLAUSE BECAUSE IT PRECLUDED VINDICATION OF STATUTORY RIGHTS IS CONSISTENT WITH THE FAA AND PERMISSIBLE UNDER THE MCCARRON-FERGUSON ACT

The New Mexico Supreme Court invoked alternative rationales for its decision. These rationales are subject to analysis under the FAA, but the treatment of them by the New Mexico court is consistent with the FAA and renders review in this court unnecessary.

The New Mexico Supreme Court affirmed the holdings of the Court of Appeals that this arbitration clause was unenforceable because it interfered with vindication of statutory rights under the Insurance Code and the Unfair Practices Act.[7] The FAA permits the non-

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[7] Pet. App. at 5a. Respondents brought claims under the Insurance Unfair Practices Act and under the New Mexico Unfair Practices Act. These statutory claims grant the Respondents the right to seek relief through the courts and, in the case of the Unfair Practices Act, treble damages. The Insurance Unfair Practices Act provides that a person who has suffered damages as a result of a violation of the Act is "granted a right to bring an action in district court to recover actual damages." NMSA 1978, § 59A-16-30 (1990). The Unfair Practices Act provides that "the court may

enforcement of arbitration clauses when they preclude the vindication of statutory rights. *See, e.g., Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1995).

Even if preemption law under the FAA precluded the court's holding with regard to the Unfair Practices Act, the McCarron-Ferguson Act, 15 U.S.C. § 1012, which protects the State's power to regulate the business of insurance, would permit the state Insurance Code to preclude enforcement. The result of the case would remain the same, precluding review by this court. *Davis*, 476 U.S. 387.

IV. IF THE FAA WERE FOUND TO REQUIRE THE ENFORCEMENT OF STATE-MANDATED ARBITRATION, THE CONSTITUTIONALITY OF THE FAA WOULD BE DUBIOUS

The gravamen of this case is that arbitration was not voluntarily agreed to by the parties, as contemplated by the FAA,[8] but that arbitration was mandated by state action.

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award up to three times actual damages . . ." for violations of the Unfair Practices Act. NMSA 1978, § 57-12-10 (1987).

[8] *Volt*, 489 U.S. at 476 ("the federal policy is simply to ensure the enforceability, according to their terms, of *private agreements to arbitrate.*") (emphasis added). Accordingly, this Court recognized that the Federal Arbitration Act "does not require parties to arbitrate when they have not agreed to do so." *Id.* "*Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.*" 489 U.S. at 479 (emphasis added). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *cited favorably in E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (The FAA is "at

Petitioners admit, Pet. at 16, that the arbitration clause at issue here is state mandated. They note, "[t]he State Supreme Court and Court of Appeals focused on the mandatory nature of the insurance policy form and specifically the arbitration provision, 13 NMAC 14.18.14, to determine that the Respondents did not voluntarily consent to arbitration when the arbitration clause was imposed upon them by the State."

The Petitioners go on to say, "The State Supreme Court's conclusion that the arbitration clause was non-consensual because it was imposed by state regulation, however, does not fall within the exceptions for non-enforceability of arbitration clauses under the FAA." *Id.* In other words, Petitioners contend that the FAA can compel enforcement of state-mandated arbitration.

Arbitration, by its nature, can constitute a waiver of the First and Fourteenth Amendment rights of access to courts[9] and the Seventh Amendment right to trial by jury.[10] If the FAA required enforcement of state action compelling arbitration, it would itself constitute state action compelling the waiver of fundamental constitutional rights. This would render the constitutionality of the FAA dubious, at

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bottom a policy guaranteeing the enforcement of private contractual arrangements.").

[9] *See Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901), in which this court equated the right to "free access to courts of justice" with the rights of freedom of expression, freedom to worship, and freedom from unreasonable searches and seizures and noted that all of them are "indispensable to a free government."

[10] *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33,52-53, *infra*.

best. *See, e.g, Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52-53 (1989)("Congress... lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.... [T]o hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. The Constitution nowhere grants Congress such puissant authority... nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal.")

State-mandated arbitration is better considered, as *Volt* at least suggests it should be, outside the scope of the FAA because of its involuntariness.

CONCLUSION

For the aforementioned reasons, the Petition for Certiorari should be DENIED.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 02-963

IN THE

Supreme Court of the United States

ALAMO TITLE INSURANCE, a member of the Fidelity National Group of Companies, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Petitioners,

v.

NICHOLAS LISANTI and GERALDINE LISANTI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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The Respondents' Statement of the Case elaborates on the initial proceeding in the New Mexico state district court which rejected Respondents' Motion for Preliminary Injunction and Permanent Injunction Enjoining Defendants From Pursuing Arbitration and Memorandum in Support Thereof (hereinafter Respondents' Motion for Preliminary Injunction). Brief in Opposition at 8-11. Respondents assert that "the Petitioners did not dispute [the Respondents'] verified factual assertion that there was no written agreement to arbitrate." *Id.* at 11. On the contrary, the Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross Motion to Compel Arbitration and Supporting Memorandum of Points and Authorities, (hereinafter Response to Preliminary Injunction) under Point V at 6-13, addressed Respondents' claim of non-consent.

Petitioners additionally raised their status as foreign corporations doing business as title insurers in New Mexico in their Response to Preliminary Injunction under Point III at 8 and attached Certificates of the New Mexico Public Regulation Commission evidencing such status as Exhibits 2A and 2B. Petitioners' Response to Preliminary Injunction, Point II, addressed Respondents' claim in their Motion for Preliminary Injunction that a referral to arbitration would constitute a denial of due process. Petitioners advised the district court that constitutional due process protections were available under appeal provisions of the New Mexico Uniform Arbitration Act, N.M. STAT. ANN. §§ 44-7-1, *et seq.* (1971) (hereinafter NMUAA). Petitioners' Response to Preliminary Injunction at 6-7. The reference to the NMUAA for one proposition, however, has not been considered by New Mexico courts as a waiver of a right to arbitrate which may be granted under federal law. *See e.g., United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 112-113, 597 P.2d 290, 297-98 (1979) (Waiver of right to

seek arbitration could not be inferred merely from party's attempt to meet all issues raised between it and another party).[1]

Respondents' assertions in their Motion for Preliminary Injunction that their statutory claims under the Trade Practices and Frauds Act, N.M. STAT. ANN., §§ 59A-16-1, *et seq.* (1993) (hereinafter TPFA), could not be referred to arbitration were contested in Petitioners' Response to Preliminary Injunction at pages 11 and 12. Petitioners directed the district court to contrasting and more specific provisions in the New Mexico Title Insurance Law, N.M. STAT. ANN., §§ 59A-30-1, *et seq.* (1985) (hereinafter Title Insurance Law), which provide that the TPFA applies to the business of title insurance "[t]o the extent not in conflict with the Title Insurance Law." § 59A-30-14. The Title Insurance Law expressly subjects the entire business of such insurance to its provisions and to regulations of the Superintendent of Insurance. *See* §§ 59A-30-2, 59A-30-4.

Respondents' Docketing Statement in the Court of Appeals characterized the appeal as an "appeal from the December 9, 1999 Order Denying Preliminary [In]Junction and Staying Proceedings." *See* Docketing Statement at 2. A preliminary injunction does not determine controverted facts. *Insure New Mexico, L.L.C. v. McGonigle*, 128 N.M. 611, 614, 995 P.2d 1053, 1056 (Ct. App. 2000). Petitioners, as non-movants were not burdened with the obligation to raise every ground which might affect the district court's decision to grant or deny a preliminary injunction, particularly since "[t]he object of the preliminary injunction is to preserve the status quo pending the litigation of the merits. This is quite different from finally determining the cause itself." *Id. quoting Pena v. San Juan Hosp., Inc.*, 528 F.2d

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1. In *United Nuclear*, the party seeking arbitration referred to Section 44-7-2(D) of the NMUAA and was preliminarily enjoined by the district court. After an appeal through the State Supreme Court and this Court in *General Atomic Co. v. Felker*, 436 U.S. 493 (1978), this Court held that the district court could not enjoin arbitration in other forums including the FAA. *Id.* 436 U.S. 497-498.

1181, 1185 (10th Cir. 1975); *see also United Nuclear*, 97 N.M. at 115, 597 P.2d at 300.

After the appeal had been fully briefed, the Court of Appeals re-characterized it as an appeal from the denial of a stay of arbitration under Section 44-7-2(B) of the NMUAA rather than Rule 1-066, NMRA 2001 (governing injunctions) and held that it would treat the appeal under a *de novo* review. Pet. App. 20a-21a. Thus, the State Court of Appeals reviewed the appeal under Section 44-7-19(B) of the NMUAA, which provides that an appeal "shall be taken in the same manner and to the extent as from orders or judgments in a civil action" rather than the abuse of discretion standard applicable to denials of preliminary injunctions, and treated it as an appeal from a final judgment. *Compare National Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 595, 874 P.2d 798, 804 (Ct. App. 1994) (Court of Appeals reviews district court decision on preliminary injunction under abuse of discretion standard.); *see also United States Steel Corp. v. Fraternal Ass'n. of Steelhaulers*, 431 F.2d 1046, 1048 (3rd Cir. 1970) ("[A] limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts. . . .").

I. THE STATE COURT RECORD AS A WHOLE DEMONSTRATES THAT THE ISSUE OF FEDERAL PREEMPTION WAS ADEQUATELY RAISED.

Respondents assert that the lack of specific findings as to a nexus between the title policy and interstate commerce "renders the court without the ability to review the issue on appeal." Brief in Opposition at 14. Respondents rely on dicta in *Gavlik Constr. Co. v. H. F. Campbell Co.*, 526 F.2d 777 (3rd Cir. 1975). The Third Circuit in *Gavlik* noted that the lack of findings as to a statutory basis for referral of claims to arbitration did not preclude a court's referral under its inherent powers to stay proceedings. *Id.* at 784. Since *Gavlik*, federal courts which have

considered claims that specific findings are necessary for review of FAA preemption claims have consistently declined to follow its ruling. *See E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026, 1040 n. 36 (5th Cir. 1977) ("Though no explicit finding was made, the . . . contract obviously is a transaction involving commerce, so the Act applies."); *Stateside Machinery Co. v. Alperin*, 591 F.2d 234, 239 n. 9 (3rd Cir. 1979) ("[U]nder all the circumstances of this case, we are able to decide whether the . . . contract involved commerce.") The evidence contained in the records of the district court, the Court of Appeals' Opinion describing the issue as reviewable *de novo*, and Respondents' failure to dispute Petitioners' assertion that the title policy involved interstate commerce present a sufficient totality of circumstances to permit this Court to review the issue on certiorari.

II. THE EXISTENCE OF ADEQUATE AND INDEPENDENT STATE LAW GROUNDS IS A DETERMINATION MADE BY THIS COURT.

Respondents assert that the State Supreme Court's Opinion rests on adequate and independent state grounds which are not reviewable by this Court. Brief in Opposition at 15. The inquiry into the sufficiency of the asserted state grounds is one which this Court undertakes itself. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986). As this Court explained in *Davis*, "[T]he point is not whether *state* law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body." *Davis*, 476 U. S. at 387-388. The State Supreme Court's conclusion that the Superintendent of Insurance lacked the authority to require arbitration clauses in policies of title insurance is reviewable to determine both whether there is an independent state law ground and whether such state law ground is adequate. The adequacy of the state law ground is itself a

federal question which *this* Court reviews *de novo*. *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 366 (1990).

The State Supreme Court's Opinion in this case does not clearly show that it rests on a *bona fide* separate, adequate and independent state law ground. *See Coleman v. Thompson*, 501 U.S. 722, 733 (1991). The State Supreme Court not only refused to consider the federal question, it ignored or refused to consider whether the New Mexico legislature had the power to construct a state regulatory scheme for title insurance which would permit referral of disputes between a title insurer and its insured to non-judicial forums. The State Supreme Court did not address whether the Title Insurance Law, Section 59A-30-14, was a more specific statute which would control in the face of conflicting provisions of the TPFA.

The State Supreme Court did not address whether state laws and regulations compelling arbitration of uninsured motorist claims were also invalid as outside the regulatory power of the Superintendent of Insurance and the legislature although this issue was briefed. New Mexico state court decisions have consistently upheld such state compelled arbitrations.[2]

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2. N.M. STAT. ANN. § 66-5-301(A) (1983) requires insurers to offer uninsured motorist coverage in conjunction with liability insurance. 13 NMAC 12.3.6 and 13 NMAC 12.3.17 are regulations of the Superintendent of Insurance imposing arbitration clauses in all uninsured motorist policies issued in New Mexico. The insured who purchases uninsured motorist coverage is compelled to accept an arbitration clause as a policy condition just as purchasers of title insurance accept arbitration as a policy condition. Both uninsured motorist policies and title insurance policies are contracts of indemnity. Shortly after the New Mexico Court of Appeals issued its decision in this case it issued an opinion in *Padilla v. State Farm Mut. Auto. Ins. Co.*, 131 N.M. 419, 38 P.3d 187 (Ct. App. 2002) upholding arbitration of uninsured motorist claims. After an extensive analysis of the history of New Mexico's Uninsured Motorist Act and the regulations of the Superintendent, the Court of Appeals did not invalidate

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See Petitioners' Brief-in-Chief (on Certiorari to the New Mexico Supreme Court) at 8-11. State courts may not avoid deciding federal issues by invoking rules which they do not apply evenhandedly. *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). The independent and adequate analysis applies whether the state law ground is procedural or substantive. *Coleman*, 50 U.S. at 729.

Likewise, the State Supreme Court did not hold that the Superintendent's regulation was void *ab initio* as Respondents' Brief in Opposition at 15 implies.[3] Rather, it held that the "regulation requiring mandatory arbitration . . . is unenforceable." Pet. App. 15a. The State Supreme Court's holding places the arbitration clause within that category of contract clauses which are contracts of adhesion because their terms are offered on a "take it or leave it" basis. Similar arbitration clauses in contracts of adhesion have been consistently held by this by this and other federal courts to be enforceable under the FAA as Petitioners have cited in their Petition at pages 13-20. Furthermore, the State Supreme Court itself earlier acknowledged that an insured generally does not bargain for individual terms within a policy but rather "'makes only broad choices regarding general concepts of coverage, risk, and cost.'" *Loya v. State Farm Mut. Ins. Co.*, 119 N.M. 1, 5,

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the regulations. *Id.* at 422-25, 38 P.3d at 190-193. It also declined to invalidate the arbitration clause in the policy as conflicting with the TPFA, § 59A-16-20(K). *Padilla*, 131 N.M. at 425-26, 38 P.3d at 193-94.

3. *Jones v. Employment Serv. Div. of the Human Services Dept.*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980), the case on which both the Court of Appeals and State Supreme Court did rely held that an agency could not by rule shorten the statutorily prescribed time for appeal from its administrative decisions. In contrast, the issues in this case relate to the legislature and Public Regulation Commission's constitutional powers to enact regulations for an industry subject to state regulation under the McCarran-Ferguson Act and the state's selection of arbitration as the choice of forum for dispute resolution.

888 P.2d 447, 451 (1994) *quoting Sanchez v. Herrera*, 109 N.M. 155, 159, 783 P.2d 465, 469 (1989). The lack of evenhandedness on the issue of arbitrability of insurance claims in the decisions of the State Supreme Court merits review by this Court.

III. THE ARBITRATION CLAUSE DOES NOT INTERFERE WITH VINDICATION OF STATUTORY RIGHTS.

Respondents admit that the State Supreme Court's "alternative rationales" for determining the arbitration clause invalid "are subject to analysis under the FAA." Brief in Opposition at 16. Relying on *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1995), they claim that the state court's "treatment of them is consistent with the FAA and renders review in this court unnecessary" since the arbitration clause was unenforceable "because it interfered with vindication of statutory rights under the Insurance Code and the Unfair Practices Act." Brief in Opposition at 16. Respondents' contention is misguided because the "statutory rights" addressed in *Graham Oil Co.* are "protections and benefits" such as the right to recover exemplary damages, reasonable attorney's fees or the right to a certain statute of limitations. *Graham Oil*, 43 F.3d at 1247-48. Enforcement of the arbitration clause at issue in this case would not affect these rights even if they were part of the Respondents' claims. Statutory claims, including claims involving unfair practices, and other general contract claims may be the subject of such clauses and are enforceable under the FAA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The arbitration clause in the title policy at issue is "nothing more than an agreement to substitute one legitimate dispute resolution *forum* for another and involves no surrender of statutory protections or benefits." *Graham Oil*, 43 F.3d at 1247. Accordingly, it is valid and is the type of agreement that "finds favor in the courts." *Id.*

Respondents apparently contend that even if the State Supreme Court's holding regarding the Unfair Practices Act was precluded by preemption under the FAA, the McCarran-

Ferguson Act "would permit the state Insurance Code to preclude enforcement." Brief in Opposition at 17. Respondents' contention is incorrect. The McCarran-Ferguson Act applies only to the "business of insurance" and to state laws "which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). This Court defined the business of insurance as "[t]he relationship between the insurer and the insured, the type of policy which could be issued, its reliability, interpretation and enforcement – these were the core of the 'business of insurance'. . . . Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance'." *S.E.C. v. National Securities*, 393 U.S. 453, 460 (1969). The Unfair Practices Act does *not* relate to the regulation of the insurance business, N.M. STAT. ANN. § 57-12-2(A), (C), (D) (1999), but provides for protection from unfair business practices in general. Accordingly, the McCarran-Ferguson Act would not preclude enforcement of the clause under the FAA with regard to the Unfair Practices Act.

The TPFA, does apply to the business of insurance, but only "to the extent not in conflict with the New Mexico Title Insurance Law." § 59A-30-14. Thus, while the TPFA permits Respondents to pursue claims in the courts, it is in conflict with the Title Insurance Law and the regulatory scheme requiring arbitration, and thus must give way to the more specific legislation and regulations. The New Mexico Constitution delegates to the Public Regulation Commission, which supervises the department of insurance, the responsibility "for regulating . . . insurance companies . . . in such a manner as the legislature shall provide." N.M. CONST. ART. XI, § 2. The New Mexico legislature declared that the business of title insurance "be totally regulated by the state." § 59A-30-2. The New Mexico Constitution as well as specific legislation and regulation established a regulatory scheme which, consistent with the McCarran-Ferguson Act and FAA, provides for arbitration of claims arising from transactions involving commerce. § 59A-30-2(A).

IV. THE FAA'S REQUIRED ENFORCEMENT OF STATE COMPELLED ARBITRATION DOES NOT ITSELF CONSTITUTE STATE ACTION.

Respondents claim that arbitration under the FAA "would itself constitute state action compelling the waiver of fundamental rights." Brief in Opposition at 18-19. Citing to *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), they further claim that "[t]his would render the constitutionality of the FAA dubious, at best." Brief in Opposition at 18-19. They thus contend, "State-mandated arbitration is better considered, as *Volt* at least suggests it should be, outside the scope of the FAA because of its involuntariness." *Id.* Despite Respondents' characterization, the FAA is a *federal* statute which does not itself require the waiver of any rights.

By quoting from *Granfinanciera*, Respondents try to couch the issue as a private right to trial by jury that cannot be abdicated. However, *Granfinanciera* makes clear that Congress may deprive parties of the right to a trial by jury: "Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, . . . the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Granfinanciera*, 492 U.S. at 53-54 (citations omitted). This power also applies to cases that are "integral parts of a public regulatory scheme and whose adjudication Congress [or in this case the State] has assigned to an administrative agency or specialized court of equity." *Granfinanciera*, 492 U.S. at 55 n.10. Thus, when the state legislature heavily regulates a field or industry like the title insurance industry, it is consistent with its police powers to assign resolution of disputes to a non-judicial forum.

Respondents' suggestion that the arbitration clause at issue is a coerced agreement under a *Volt* analysis is not persuasive. Brief in Opposition at 19, n.8. The federal courts have consistently treated arbitration clauses as voluntary even if the agreement itself is a contract of adhesion or includes an

arbitration clause compelled under a regulatory scheme. *See e.g., Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 572, 589 (1985). *R.J. O'Brien & Associates, Inc. v. Pipkin*, 64 F.3d 257, 261 (7th Cir. 1995) (Mandatory nature of registration in National Futures Association does not obviate consent to submit to arbitration procedures).

Applying the FAA in the context of these facts is not only appropriate, it is necessary. The FAA does not constitute state action, but rather remains a proper federal statute that requires enforcement of the arbitration clause in this case and, under principles of federal preemption, requires reversal of the State Supreme Court's opinion to the contrary.

CONCLUSION

For the reasons set forth in the Petition and this Reply, the Petition for Certiorari should be granted.

Respectfully submitted,

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